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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. ————

GEORGE W. ROSENTHAL, Executor of the Estate of Marion R. Rosenthal, Deceased,
Respondent,

v.

TRANS WORLD AIR LINES, INC.,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, Trans World Air Lines, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit entered on January 17, 1974, reversing the judgment of the District Court of the United States for the Southern District of Ohio. The said appeal in the United States Court of Appeals for the Sixth Circuit was docketed as number 72-2211.

OPINION OF THE COURTS BELOW

The United States District Court for the Southern District of Ohio filed two opinions. The first, titled Finding and Conclusions (on claims by TWA and Delta against United States under Federal Tort Claims Act), was filed June 1, 1972. (infra, pp. 1a-28a). The second, entitled Order on Defendant, Delta's Post Trial Motions, was filed October 11, 1972. (infra, pp. 29a-35a). The opinion of the Court of Appeals for the Sixth Circuit is recorded in — F.2d —. (infra, pp. 36a-67a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1974. (infra, p. 68a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether or not the following findings by a Circuit Court of Appeals in reviewing a judgment based upon a unanimous jury verdict contravene the right to trial by jury guaranteed by the Seventh Amendment of the Constitution of the United States.

a) that negligence of an airline crew in taxiing off the paved runway and miring their aircraft in mud near the runway did not proximately cause the aborted take-off and crash of another aircraft which passed through the jet exhaust of the mired aircraft;

b) that negligence of an airline crew in failing to turn off its engines which produced jet exhaust across an active runway did not proximately cause the aborted takeoff and crash of another aircraft which passed through that jet exhaust;

c) that negligence of an airline crew in reporting that it was "clear of the runway" when its position was a hazard to aircraft using that runway did not proximately cause the

aborted take-off and crash of another aircraft using that runway;

d) that the inability of an airline crew to see the position of another aircraft mired near the runway before beginning its take-off on that runway constituted negligence or erroneous conduct that intervened as a proximate cause of the ultimate aborted take-off and crash of their aircraft;

e) that the decision of an airline crew to continue its take-off when it first sighted another aircraft near the runway six seconds before reaching that other aircraft constituted negligence or erroneous conduct that intervened as a proximate cause of the ultimate aborted take-off and crash of their aircraft;

f) that the decision of the pilot in command to abort the take-off of his aircraft when he believed that his aircraft had collided with another aircraft constituted negligence or erroneous conduct which intervened as a proximate cause of the crash of his aircraft;

g) that the inability of an airline crew to see the position of another aircraft mired near the runway before beginning its take-off on that runway constituted negligence on its part proximately contributing to the ultimate aborted take-off and crash of their aircraft;

h) that the decision of an airline crew to continue its take-off when it first sighted another aircraft near the runway six seconds before reaching that other aircraft constituted negligence on its part proximately contributing to the ultimate aborted take-off and crash of their aircraft;

i) that the decision of the pilot in command to abort the take-off of his aircraft when he believed that his aircraft had collided with another aircraft constituted negligence on his part which proximately contributed to the crash of his aircraft;

j) that a jury could not infer from an intentional oblitera-

tion of evidence by an airline crew that that crew had foreseen and/or that its conduct had caused the destruction of another aircraft;

k) that an aircraft crew, on take-off, is negligent or "erroneous" in accepting the assurance of another airline crew, given to the air traffic controller, that it is "clear of the runway" as meaning that aircraft is in such position as to present no hazard to aircraft taking off on that runway;

All the above issues were submitted to the jury on proper instructions, neither objected to at trial, nor assigned as error on appeal.

CONSTITUTIONAL PROVISIONS INVOLVED U.S.C. CONSTITUTION AMENDMENT VII – CIVIL TRIALS

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court in the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This litigation originated as two actions filed in the United States District Court for the Southern District of Ohio: Civil action no. 6901 by George W. Rosenthal, Executor of the Estate of Marion R. Rosenthal, Deceased, against Trans World Air Lines, Inc. (hereinafter referred to as TWA) and Delta Air Lines, Inc. (hereinafter referred to as Delta), for the wrongful death of Mrs. Rosenthal; and civil action no. 6902 by Mr. Rosenthal, individually, seeking damages for personal injuries. Mr. and Mrs. Rosenthal were passengers on the TWA flight. Jurisdiction for both actions was pursuant to 28 U.S.C. Section 1332 and based upon diversity of citizenship.

In the same action, TWA filed cross-claims against Delta

and the United States claiming indemnity as to the Rosenthal actions and for damages for destruction of TWA's aircraft. Delta filed cross-claims for indemnity as to the Rosenthal actions against both TWA and the United States.

The accident of November 6, 1967, which gave rise to this litigation, involved two aircraft. The TWA plane was a Boeing 707 designated TWA Flight 159. The Delta plane was a DC-9 designated as Delta Flight 379.

TWA Flight 159 was a scheduled flight from Boston Massachusetts to Los Angeles, California, with intermediate stops at John F. Kennedy International Airport in New York City and at the Greater Cincinnati Airport. The flight crew consisted of Captain V. D. Matheny, First Officer R. G. Reichardt and Flight Engineer R. J. Barron, all three of whom boarded the aircraft in New York City.

At approximately 6:35 p.m., having discharged its Cincinnati-bound passengers and taken aboard its Los Angeles-bound passengers, TWA-159 was cleared to taxi to the runway in preparation for its take-off.

FAA regulations require of all commercial airlines that the plane be equipped with a cockpit voice recorder which records on tape everything said in the cockpit of the aircraft. Such a cockpit voice recorder was in operation in TWA-159 from the time the power was turned on, while the plane was at the loading ramp, until the electrical system was rendered inoperable by the crash. That tape was entered into evidence and played for the jury.

At the same time that TWA-159 was approaching the eastern end of its take-off runway, Delta-379 was landing on the same runway.

Delta-379 was a scheduled flight from O'Hare International Airport, Chicago, Illinois to the Greater Cincinnati Airport. Its flight crew consisted of Captain R. L. Rowley and First Officer R. N. Hendrickson.

Delta-379 and TWA-159 were two of four aircraft that were involved in a relatively close pattern of landings and take-offs that were then occurring and about to occur at Great-

er Cincinnati Airport. Following Delta-379 in the landing pattern was TWA-128 and behind that flight, American Airlines Flight 770. The procedure was for Delta-379 to complete its landing roll-out and to clear the runway so that TWA-159 could commence its take-off roll and be off the runway before TWA-128 arrived at the airport. TWA-128 would then have to land and clear the runway for the next landing aircraft, American-770. The timing of this sequence called for crisp, professional action on the part of all crews, but such sequences are not unusual in busy urban airports.

Before TWA-159's take-off and as it was approaching the eastern end of runway 27L, Delta-379, with First Officer Hendrickson at the controls, landed on that runway. After landing, and at such time as its speed had been sufficiently decreased so as to make nose wheel steering more effective than rudder steering, Captain Rowley took over its control.

Up to that point it might be said that the landing of Delta-379 was normal. At that point, however, things began to go awry. Although it was the intention of Captain Rowley to exit from runway 27L by making a right turn onto the inactive runway 18-36, he did not do so. The fact is that he overshot his turn.

Captain Rowley then elected to proceed back to the turnoff that he had missed rather than proceed to the next turnoff to the West and it was at that time, according to the testimony, that First Officer Hendrickson requested permission to make that turn.

It would be well that we move back to a prior communication so that this might fit in context. Shortly after Delta-379 touched down on runway 27L and while it was in its landing roll-out, the local controller, Mr. Blaho, in the control tower, advised Delta-379 that as soon as it had gotten physically off the runway it should switch to the ground control frequency as opposed to local control. It was to that communication that First Officer Hendrickson replied, "Roger – can we make a short 180?" Mr. Blaho replied, "uh – yeah, you can turn off right there." First Officer Hendrickson acknowledged by saying, "OK."

At that time Captain Rowley, at the controls of Delta-379, proceeded to turn his aircraft to the right by turning its nose wheel to its full extent in that direction. Instead of completing the 180° turn, Captain Rowley brought the plane to a stop after it had completed only half that arc and was headed in a northerly direction at a right angle to the runway. In that stopped position, Captain Rowley and First Officer Hendrickson attempted to determine the position of their nose wheel with reference to the edge of the runway – they could neither see their nose wheel, nor could they see any runway ahead of them. Captain Rowley again applied power at which time the DC-9, instead of continuing in its arc to the right, proceeded straight ahead in a northerly direction causing the nose wheel to skid off the runway and into the dirt.

At about this same time, some seventeen seconds after Delta-379 requested permission to make a 180° turn, the local controller, Mr. Blaho, cleared TWA-159 for take-off and that clearance was acknowledged.

After clearing TWA for take-off Mr. Blaho scanned the runway and, in doing so, saw that Delta-379 was in a static position near the intersection of runways 27L and 18-36. At that time, nineteen seconds after having issued TWA's first take-off clearance, Mr. Blaho directed this inquiry to the Delta aircraft, "Delta-379, you're clear of the runway aren't you?" Without hesitation, First Officer Hendrickson replied, "Yeah, we're in the dirt though."

First Officer Hendrickson testified that upon inquiry from the tower as to whether their aircraft was clear of the runway, he looked out the right window to the runway lights and "made a judgment that" they were clear of the runway, although he could not see the tail of his aircraft. Captain Rowley stated that he, at that time, did not know where his aircraft was located with reference to the runway.

Immediately after receiving Delta's response that it was clear of the runway, Mr. Blaho conveyed that information to TWA-159 and again cleared them for take-off. Captain Math-

eny replied, "OK, we're rollin'." This occurred 11 seconds after the tower had inquired as to Delta's position.

When the landing lights of TWA-159 disclosed the position of Delta-379 to the right of the runway, Captain Matheny said, "Not very damn far off the runway." First Officer Reichardt replied, "Sure as hell isn't." Four seconds later, a voice in the cockpit of the 707, which is attributed to Captain Matheny, stated, "see that fire in the end?" At that same instant, the cockpit voice recorder of TWA-159 records the sound of a "pop". That instant is identified as being 2340:15.5 GMT.

Again, for the purpose of illustrating the rapid succession of the events related, it should be pointed out that only 6½ seconds elapsed between the time the TWA crew saw the position of the Delta plane and the time it passed behind it. Prior to seeing the Delta aircraft and during the first one minute and four seconds of its take-off roll, the only information that the TWA crew had as to the position of the Delta plane was the information supplied by the Delta crew.

First Officer Reichardt commenced the abort procedure by cutting back the engine power and applying maximum braking. Then, still applying brakes, he pulled the reverse levers into reverse position while, at the same time, calling for the application of spoilers. The record is clear that First Officer Reichardt reacted to the emergency one second after its occurrence and accomplished all of the abort procedures in an elapsed time of four seconds. For the next eleven and a half seconds First Officer Reichardt and Captain Matheny implemented the reverse thrust and spoilers with maximum braking. Although they succeeded in rapidly decreasing the speed of the aircraft, they were not able to bring it to a stop on the runway. It went beyond the end of the runway, jumped a small gulley, and came to rest near a road at the perimeter of the airport grounds. This resulted in such damage to TWA's 707 as to render it a total loss resulting in damages in the amount of $2,216,000.00, for which amount verdict and judgment have been rendered in favor of TWA and against Delta.

Various take-off speeds were computed with reference to the take-off of TWA-159 before it left the terminal and a card referencing those speeds was posted, as required, in the cockpit of that aircraft. The speeds in question are referred to as V_1, V_r and V_2. "V" stands for velocity. V_1 is a computation based upon what is referred to in the airline industry as the "balanced runway concept". It has as its hypothetical premise, for present purposes, the failure of one of the four engines of the Boeing 707-131 aircraft. The computed V_1 speed indicates to the pilot that if he experiences the failure of one engine prior to or at the time of reaching that calculated speed, he can still bring the aircraft to a stop within the confines of the remaining runway. If, on the other hand, he experiences the failure of one engine at or above that computed V_1 speed, the aircraft is capable of becoming successfully airborne on the remaining three engines.

Although V_1 has been referred to as a "decision speed", it relates, in fact, to only one situation – the failure of one engine of the aircraft. It does not mandate the completion of take-off after that speed under all circumstances and certainly not in a situation where structural damage is suspected.

In the case of TWA Flight 159, V_1 speed was computed at 132 knots, V_r speed at 140 knots and V_2 speed at 150 knots. It is indicated that the maximum speed achieved by TWA-159 was 143 knots. Although TWA procedures called for the pilot not at the controls – Captain Matheny in this case – to call out V_1 and V_r speeds, they were not called out in this instance for the reason that, at the time those speeds were reached, the attention of the TWA crew was distracted by the sight of Delta-379 in its close proximity to the runway.

Investigation conducted after the abort disclosed the position of the Delta-DC-9 at the time to be mired in the mud at the Northwest corner of the intersection of runways 27L and 18-36. It was on a North-Northeast heading with the aftmost portion of its tail 7′ North of the North edge of runway 27L and its right wing extending over the paved portion of runway 18-36.

A substantial amount of testimony centered on the meaning of the term "clear of the runway" as used by the local controller and the significance of Delta's response to it. The term has no official definition and does not appear to be a "term of art". The definition given by Mr. Blaho, the local controller, was ". . . sufficiently far enough away from this runway where his aircraft would be no hazard to any aircraft operating on the runway".

There is one other fact of considerable significance. As previously indicated, everything that was said or could be heard in the cockpit of TWA-159 from the time of start up until the time of crash was in evidence through the cockpit voice recorder tape and the transcript of it. The same situation was not true of Delta-379. Shortly after the crash of TWA-159, Captain Rowley in Delta-379 instructed First Officer Hendrickson to press the erase button. Various explanations are given by the Captain and First Officer of Delta-379 as to why they erased their tape. On one hand, they state it was because of profanity used in the cockpit of that aircraft after it left the runway and got stuck in the mud. It was the further explanation that it was customary for Delta crews to erase their cockpit voice recorder "at the termination of a flight".

The portion of the Delta cockpit voice recorder which contained the twenty-seven minutes, fourteen seconds, of recorded material following the erasure was obtained and offered into evidence and played to the jury. The partial transcript of that tape prepared by the National Transportation Safety Board was also offered into evidence. Among the first things recorded on the Delta cockpit voice recorder following the erasure were, "Shh!" . . . "Voice Recorder".

That portion of the Delta cockpit voice recorder also indicates considerable concern as to the exact location of their aircraft with reference to the runway and considerable question as to what effect it might have had on the TWA plane.

The jury returned verdicts in favor of the Estate of Marion Rosenthal and against Delta in the amount of $105,000.00; and in favor of Mr. Rosenthal and against Delta in the

amount of $45,000.00; and in favor of TWA on its cross-claim against Delta in the amount of $2,216,000.00. Subsequent thereto, Delta settled with the Estate of Mrs. Rosenthal and with Mr. Rosenthal so that neither of those original Plaintiffs are now parties to this litigation.

The issues with reference to the liability of the United States were submitted to the Court and in Findings and Conclusions filed on June 1, 1972, the Court found those issues in favor of the United States.

The jury was charged fully and properly on the issues of negligence on the part of Delta; contributory negligence on the part of TWA; assumption of risk; and proximate cause. No error was assigned with reference to that charge.

It should be pointed out that the trial court *who heard and was responsible for weighing the same evidence* (with reference to the Federal Tort Claims case) found the following facts, among others:

VIII.

"Clear of the runway" means – to take some alternative definitions –

(a) 'Far enough away so that another airplane can safely use it for landing or takeoff.'

(b) Sufficiently far enough away from the runway that the reporting pilot's aircraft would be no hazard to other aircraft operating on the runway.

(c) That the 'runway is usable' – i.e., the reporting aircraft is no longer a factor in the flight of another aircraft using that runway.

The 'clear' means not only 'objective position,' i.e., objective closeness, but includes from a 'jet blast' point of view.

Under all the circumstances in this case, Delta was not 'clear of the runway', but the tower acted properly in relying on the report and issuing a clearance. The tower did not abdicate any responsibility of visual observation.

The tower could not reasonably have done anything more than it did to acquire knowledge of the location of Delta. The controller's problem, visualwise, was one of 'degree'. He knew before issuing the second clearance, and as the result of his visual 'scanning' after the 'anticipation' clearing, that Delta was stuck in the mud and was not moving and was somewhere in the vicinity of the intersection of the runways three-quarters of a mile away. He had no way of knowing or telling whether the Delta tail was 'on' or 'off' or whether, if off, it was off by 7 feet or 70 feet or 100 feet. Visual observation and binoculars (not used) were not helpful – whether the problem be a 'depth perception' or more accurately a 'separation perception' he could at best only exercise the judgment of a person three-quarters of a mile away who could not see the fuselage of the plane – so he did the proper thing and asked the 'experienced man on the spot' and having asked and gotten an immediate reply, he did the reasonably proper thing in relying on the reply. It is pretty obvious that had the tower been informed by Delta that the aircraft's tail was '7 feet' from the runway or that 'Delta did not know', the second clearance would not have issued. The quick 'yeah' from the DC-9 indicated that it presented no problem to either an aircraft or its pilot using the runway for takeoff. The tower was under no duty to pursue the matter further.

X.

A duty to warn is not absolute. It exists when one individual knows, or in the exercise of reasonable care should know, of the existence of a potentially dangerous situation and a second person is unaware of it. There is no such duty when there is no superior knowledge. In this case TWA and the tower had *equal* knowledge. The superior knowledge both opportunity-wise and actual was with Delta."

The appeal taken by Delta to the Sixth Circuit dealt only with the issues as between TWA and Delta. No issue was then presented or is now presented as to the liability of the

United States. The Court of Appeals for the Sixth Circuit reversed the judgment that was entered upon the jury verdict and entered judgment for Delta. The stated basis for that reversal was:

1. That Delta's conduct was not a proximate cause of the accident. (assumedly as a matter of law, although not so stated)
2. That . . . TWA's negligence or 'erroneous conduct' intervened as a proximate cause. (assumedly as a matter of law, although not so stated)
3. That, as a matter of law, TWA was contributorily negligent.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

First Point: The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in any Court of the United States, Than According to the Rules of the Common Law." There Being No Rule of Law Making Such a Finding by the Jury Improper.

I.

This case affords a classic example of the necessity for preserving the right to jury trial in civil cases as well as the necessity for constant vigilance against incursion into that right by Appellate review. In reversing a unanimous jury verdict, the Circuit Court of Appeals based its findings exclusively on issues of proximate cause and contributory negligence – two issues which the common law has historically regarded as issues of fact rather than of law.

When, as in this instance, a Circuit Court of Appeals violates the clear mandate of the Constitution by reversing a jury's determination of factual issues by retrial rather than review, that violation can find no correction and that abuse can find no remedy, but in this Court. This Court has many times recognized the necessity of exercising its function as the ultimate protector of the rights of litigants guaranteed by the Seventh Amendment. (*Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500; *Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108; and *O'Leary* v. *Brown Pacific Maxon, Inc.*, 340 U.S. 504.)

This Court has consistently emphasized and reaffirmed the importance and the purpose of the Seventh Amendment. In *Baltimore & Carolina, Inc.* v. *Redman*, 295 U.S. 654, Justice VanDevanter stated, at page 657:

> "The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted. The amendment not only preserves that right, but discloses a studied purpose to protect it from indirect impairment through possible enlargement of the power of re-examination existing under the common law, and to that end, declares that 'No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.'
>
> The aim of the amendment, as this Court has held, is to preserve the substance of the common law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the Court and issues of fact are to be determined by the jury under appropriate instructions by the Court."

Justice Murphy might well have been talking about the present case when he said:

> "It is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. • • • That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." (*Tennant* v. *Peoria & P.U. Railway Co.*, 321 U.S. 29, at page 35)

A review of the opinion written by the Circuit Court in reversing the jury verdict in the present case makes it obvious that the Circuit Court did just that. It searched the record for conflicting circumstantial evidence toward the purpose of discrediting the fact-finding of the jury. There were two TWA pilots in the cockpit of Flight 159. One of them, First Officer Reichardt, was acting as pilot in command at the time of this take-off and the other, Captain Matheny, was acting in the capacity of co-pilot. At no less than eight places in its opinion, the Circuit Court refers to testimony by Captain Matheny which it finds to be in conflict with evidence of other TWA witnesses (42a, 47a, 48a, 49a, 50a, 51a, 55a, 61a). This, we submit, in and of itself, demonstrates a propensity for retrial, not review. It needs no citation of authority to state that the function of weighing the evidence, and all of the evidence, belongs to the jury and the jury alone.

As related to each, major, factual issue, the following presents an analysis — in most cases a tri-partite analysis — of

the evidence: (1) as re-tried by the Circuit Court; (2) as tried by the jury; and (3) as viewed by the trial court (which, uniquely in a jury case, sat as a fact finder in the case against the U.S.).

Delta's Conduct Resulting In Its Aircraft Becoming Mired in the Mud.

The Circuit Court, in describing the roll-out and turn of the Delta plane, characterizes its movement as having "rolled slightly west of 18-36". (40a) From a review of the evidence, it could more accurately be said that the Delta plane "missed" or "overshot" that turn-off. The Circuit Court states "such a turn, the equivalent of a 'U turn', was necessary to prepare to leave runway 27L . . ." (40a) The aerial photograph of the runway that was in evidence clearly shows the availability of a taxiway farther to the West that the Delta crew could have used instead of returning to runway 18-36.

The Circuit Court states that the Delta captain, after turning his aircraft at right angles to the runway and coming to a stop, ". . . did estimate the distance between the nose wheel and the runway to be sufficient to allow him to complete his 180° turn". (41a)

The Circuit Court ignores the fact that the Delta captain, in making this observation, could see neither his nose wheel nor the runway edge. Nor did the Circuit Court comment on the lack of plausible explanation as to why the Delta aircraft was brought to a stop in that position.

Credibility of Delta Crew

In considering the circumstances surrounding the miring of the Delta aircraft and the extent to which engine thrust was used during that critical time period, the Circuit Court obviously accepts at face value the testimony of the Delta Cap-

tain and First Officer. The credibility of these two witnesses was critically in issue in light of their intentional erasure of the Delta cockpit voice recorder, which eliminated from evidence all of the conversation and other sound that would otherwise have been preserved on that tape.

The District Court took the view that "one who destroys evidence opens himself up to any legitimate inference argument . . ." (32a) . . . and that the 'engine pitch' argument was perfectly legitimate". (32a)

The Significance of V_1 Speed

The Circuit Court concluded that V_1 speed was a decision speed for all purposes and that an aborted take-off beyond that speed constituted negligence. There was testimony, not only by TWA witnesses but also by a N.T.S.B. investigator, that V_1 speed is referable only to engine failure and that take-off beyond V_1 is not called for if structural damage is suspected. The District Court observed that V_1 is not a decision speed for all purposes, and that "one does not go from abort only to negligence". (18a)

TWA's Conduct Upon Sighting The Delta Aircraft

The Circuit Court, making no reference to time sequence, found that TWA did not take action that was then available to them to abort take-off at the time they first sighted he Dela aircraft near the runway. The TWA cockpit voice recorder tape, which was played at the time of trial and the transcript of it which was in evidence, demonstrated that only 6 seconds of time elapsed between the sighting of the Delta aircraft by TWA and the time the TWA plane passed behind Delta. The jury heard substantial and impressive testimony as to the risks involved in initiating an abort under such circumstances.

Even the testimony of Delta's expert, indicated that no abort should have been initiated at the time of that sighting. The District Court observed that this was a question of judgment under the circumstances.

Again dealing with the time interval during which the TWA crew first sighted the Delta aircraft, the Circuit Court found that the TWA Captain breached his duty in not calling out V_1. It was the testimony of both TWA pilots that at that time their attention was distracted by the closeness of the Delta plane. The District Court commented upon the plausibility of such distraction. (18a)

TWA's Decision To Abort

The Circuit Court concluded that the aborted take-off resulted from the erroneous judgment of the TWA First Officer and, in discussing that pilot's conviction that there had been contact, quotes from his testimony at trial that the loud report that he heard and the roughness in his controls, together with the proximity of the Delta plane "led me to believe I had possibly hit the Delta aircraft". (47a) By contrast, the TWA cockpit voice recorder tape presented to the jury the First Officer's live, instantaneous, res gestae statement at that instant: "Good God, I hit him." In commenting upon the First Officer's decision, the District Court concluded that he "did right". (21a-fn.)

In discussing the decision to abort, the Circuit Court referred to the "First Officer's obvious panic". (61a) The record demonstrates that First Officer Reichardt, as a result of his training and skill, made his decision to abort the take-off exactly 1 second after what he believed to have been a collision; and that in the following 4 seconds, he accomplished all that was necessary and called for in the abort procedure. The District Court concluded that the abort was satisfactorily performed. (19-20a)

The Meaning Of "Clear Of The Runway"

The Circuit Court found that Delta's position near runway 27L did not constitute a hazard. (49a) It was the testimony of the air traffic controller to whom Delta had reported its position that that position (as he later found it to be) did constitute a hazard and that, had he known of its true position, he would not have cleared TWA-159 for take-off. The District Court made a finding as to the meaning of "clear of the runway" and concluded that, on the basis of any proper definition, the Delta plane was not clear of the runway. (26-27a)

As the foregoing comparisons graphically illustrate, the Circuit Court not only engaged in fact-finding and weighing of evidence, but methodically searched the record in an attempt to support its "view" and, in doing so, found not only that the trial court, who heard this evidence, was clearly erroneous, but that the 12 jurors, who based their verdict upon that same evidence, could not reasonably have concluded as they did.

The opinion of the Circuit Court is replete with expressions such as: "a fair reading of his testimony" (61a); "fair consideration of the evidence" (62a); "we are of the view" (56a); "we are persuaded" (52a); "we discuss it as our speculation" (65a). The use of such expressions leads to the inescapable conclusion that the Circuit Court was, in fact, weighing the evidence. In concluding its review of the evidence, the Circuit Court made the following statement:

> "Without further and extended detailed discussion of the evidence, we express *our view*• that *but for*•• the erroneous judgment of the TWA First Officer, that he had struck the Delta plane, followed by his attempt to abort the flight without knowing, or having been advised, that he had exceeded the speed at which the abort could

> be successfully accomplished, the casualty here involved would not have occurred." (50a)
> (* this emphasis added)
> (** Circuit Court's emphasis)

It is respectfully submitted that in this statement the Circuit Court describes and characterizes its basis for reversal which resulted not from an appellate review, but from an appellate retrial. The Circuit Court has substituted its judgment for that of the jury and, that, the Seventh Amendment will not permit. The following statement by Justice Brennan in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 at page 504:

> "At best, uncertainty as to the fact arises from the petitioner's testimony, and in that circumstance not the Court, but the jury, was the tribunal to determine the facts."

So also, in *Richmond & DRR* v. *Powers*, 149 U.S. 43, at page 45:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

II.
PROXIMATE CAUSE IS ONE OF THE TWO ISSUES UPON WHICH THE CIRCUIT COURT BASED ITS REVERSAL IN THIS CASE.

That statement, standing alone, if it does not in itself demonstrate error, at least demonstrates the necessity of investigation. It is a long-standing and universally-recognized rule that proximate cause must be a question of fact rather than of law, and therefore, is exclusively within the province of the jury and not of the Court, either trial or appellate.

The Circuit Court dealt with proximate cause in two respects. It said (1) that negligence, if any, of the Delta crew was not a proximate cause of the accident, and (2) that negligence or erroneous conduct of the TWA crew intervened to eliminate any negligence of the Delta crew as a proximate cause. It is interesting to note that, in stating these conclusions (39-40a) the Circuit Court did not indicate in either respect that it so found "as a matter of law". By contrast, in dealing with the subject of contributory negligence that all-important phrase was used. This omission must logically pose this question: Did the Circuit Court find the lack of proximate cause in one situation and the existence of intervening cause in another as a matter of fact, rather than as a matter of law?

Not only did the jury, which found proximate cause to exist, have before it all of the evidence that we have described, but it was thoroughly charged on the meaning and application of proximate cause. There was no objection to that charge, nor was any error as to that charge assigned in appeal. Thus, based upon probative evidence and proper instruction, the jury found proximate cause to exist.

The District Court in its opinion made specific reference to the conduct of the Delta crew, both in becoming mired in the mud and in reporting its position to the tower, as being causes but for which this accident would not have occurred. (29-30a) and concluded by observing:

> "Conceding all that Delta says with respect to the deficiencies of TWA, proximate cause is a thing for a jury and not for a court." (30a)

As is true of so many of the basic principles in the law of torts, Professor Prosser has stated the proposition with clarity:

> "In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening

> cause, the question is for the jury, subject, of course, to suitable instructions from the court as to the legal conclusions to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that 'proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.'" (Law of Torts, William L. Prosser, Chap. 7, p. 290)

III.

IF IT MAY BE SAID OF PROXIMATE CAUSE THAT IT IS UNIQUELY WITHIN THE PROVINCE OF THE JURY, IT MAY WITH EVEN GREATER FORCE BE SAID OF CONTRIBUTORY NEGLIGENCE.

The record discloses an abundance of probative facts upon which the jury's verdict was based; and this is true as to the question of proximate cause as well as the question of negligence on the part of Delta and the absence of negligence on the part of TWA. This Court stated in *Lavender* v. *Kurn*, 327 U.S. 645, at p. 653:

> "Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Clearly, the Seventh Amendment was violated in this case and that violation requires the corrective and remedial action that only this Court can supply.

We cite to the Court the case of *Arkright Mutual Ins. Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, not as controlling authority, but as an example of what would have been proper handling of this case by the Sixth Circuit. At page 1275, the Court states:

> "But even assuming the procedural adequacy of the motion, the trial transcript here reveals that there was substantial questions of negligence and causation raised by appellant's testimony. Where such questions exist, both the Seventh Amendment and the common law require that only the jury resolve them. Appellants respond, however, that there were no factual disputes for resolution and, consequently, a verdict in their favor was required. Excepting, *arguendo*, that the facts were undisputed, the absence of evidentiary conflicts in no way implies that the plaintiff has borne the burden of proof as a matter of law. It is the jury alone which must also draw conclusions from these facts."

Second Point: The Decision of the Court Below is in Conflict with the Rule Laid Down by This Court in Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, which held that Redetermination by the Court of Appeals of the Facts Found by the Jury Was Contrary to the Provision of the Seventh Amendment that "No Fact Tried By a Jury, Shall be Otherwise Re-Examined In Any Court of the United States, Than According to the Rules of the Common Law."

In addition to the Seventh Amendment question, the *Atlantic & Gulf Stevedores* case dealt with other issues with which we are not concerned, including a detailed review of the Court's charge to the jury. As previously indicated, there was no objection made or error assigned with reference to the Court's charge to the jury in the present case. Moreover, as is clear from the record, the Court fully charged the jury on the

subjects of negligence, contributory negligence, proximate cause and intervening cause.

We have set out a summary of the evidence in our Statement of the Case and have made detailed references to it under the First Point covered in this Argument. There can be no doubt but that there was substantial probative evidence of each point: (1) the negligence of Delta; (2) the causal relationship between Delta's negligence and the aborted take-off and crash of the TWA plane; and (3) the care exercised by the TWA crew. It is obvious from a reading of the opinion of the Circuit Court that it disagreed with the jury's conclusion as to these issues. The Circuit Court stated, *in fact*, its own contrary conclusions. In the *Atlantic & Gulf Stevedores* case, it was made entirely clear that the failure of the Circuit Court to concur with the facts found by the jury, does not constitute the basis for a reversal, but does, in fact, constitute a violation of the guarantee of jury trial afforded by the Seventh Amendment. At page 358-359, Justice Douglas states:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we, nor the Court of Appeals, can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law."

In the present case, the District Court was afforded opportunities on motions for summary judgment and motions for directed verdict during trial to predetermine the facts. That Court did, however, observe and follow the mandate of the Seventh Amendment. The Circuit Court, however, in disregard of that mandate and in disregard of the instructions of this Court as clearly defined in the *Atlantic & Gulf Stevedores* case, did redetermine the facts found by the jury. It is, therefore, necessary, as it was in the *Atlantic & Gulf Stevedores*

case, that this Court reverse the Circuit Court and reinstate the judgment of the District Court that was based upon that jury verdict.

Third Point: The Issues Herein Are of Paramount Importance to the Airline Industry And to the Federal Agencies Charged With Air Traffic Control.

TWA and Delta have in common with all of the other members of the airline industry, the Federal Government and the public and private operators of airports throughout the Country, and, indeed, around the world, the responsibility for the safety of the lives and property of hundreds of thousands of airline passengers daily.

As the facts herein clearly demonstrate, the operation of every busy airport involves a constantly rapid succession of landings, take-offs and ground movement of a substantial number of commercial aircraft in addition to innumerable smaller private aircraft.

The Federal Government, through the Federal Aviation Agency, and, even more specifically, the Air Traffic Control branch of that agency, has attempted (and with a surprisingly high degree of success) not only to regulate and control the movement of this aircraft, but to establish intercommunication for the purpose of providing knowledge on the part of all those persons who must have knowledge of the location and movement of planes both in the air and on the ground. It is essential to the control and direction of aircraft that the intercommunication between planes and the control tower be accurate and precise so as to afford a reliable basis for knowledge on the part of all concerned.

The Air Traffic Controller in this case, in scanning the runway for the purpose of determining the safety for the take-off of TWA-159, saw that the Delta plane was stopped in the vicinity of the intersection of that runway and the intersecting runway 18-36. Not being able, from his position in the tower, to determine with accuracy Delta's exact position,

he asked the Delta crew whether their plane was "clear of the runway". He received an immediate affirmative reply on the basis of which he again cleared TWA for take-off. In commenting upon this sequence of events and their significance, the trial court stated:

> "It is uncontradicted in this record that local controllers not only ask aircraft operators as a matter of some practice just where they are, but also having received an answer, rely on it and issue other clearances accordingly. The example easiest to understand is this: many times planes land in mist or fog, which does not amount to subminimal conditions, but which are such that an airplane cannot even be seen from the tower after it is landed. Under such conditions, of course, the controller is practically utterly dependent upon the pilot. Now, what answer should Delta have given? Delta should have answered, 'Our rear end is so close to the runway that we don't know just where we are, and what's more, we are stuck in the mud and can't do anything about it.'" (11a)

To permit this litigation to remain in its present posture would constitute an endorsement of the reckless manner in which Delta handled its duty of accurate communication in this case. It would have the effect of endorsing not only the interpretation that Delta chose to place upon the term "clear of the runway". It would have the effect of encouraging airline crews generally, should the circumstances make it convenient for them to do so, to place minimal, qualified or self-serving interpretations upon any communication, using their desires and convenience as the standard rather than the safety of those who may need to depend upon their communication.

Safety has been the hallmark of the airline industry and of the Federal Aviation Agency in virtually all aspects, from construction and maintenance of equipment to training and supervision of personnel. It is respectfully suggested that communication between planes and/or controllers is a safety-oriented responsibility of no-less significance. The jury and

the trial court in the trial of this case recognized that fact, although the Circuit Court appears to ignore it. The record, as it now stands, creates a dangerous precedent that necessitates correction.

Fourth Point: The Issue Herein Presented As to the Destruction of Evidence And the Inference to be Drawn Therefrom Is of General Interest and Partciularly of Interest to the Airline Industry and the Federal Agencies Charged with Air Traffic Control.

The use of electronic recording devices has become and is becoming more and more commonplace and as a natural and, as an inescapable correlary, the use of electronic tapes is becoming the subject of evidence with ever greater frequency. Electronic tape recordings as evidence present unique problems. One such problem that may arise, and did in this case, is the destruction of evidence contained on electronic tape. Almost all tape recording devices permit some mode of erasure of recorded material.

It is uncontroverted that the erase feature was activated by Delta in this case. Further, it is uncontroverted that that erasure was accomplished deliberately by the First Officer upon instruction by the Captain. But for that erasure, all conversation and all sound within the cockpit of the Delta plane during the critical time period between Delta's landing and TWA's abort would have been recorded and would have been available as evidence in this case.

The issue which we now urge upon this Court as one of great significance and general interest is the legal effect of the deliberate destruction of such evidence.

It is suggested that the rule that should apply is that stated by Professor Wigmore:

> "The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the

possessor . . ." (II Wigmore on Evidence, Third Edition, Sec. 291, p. 187).

The following quote from the 1972 Pocket Supplement of Wigmore appears to have particular application to this case:

> "The common experience of mankind in dealing with the ordinary affairs of life should offer, it would seem, an indispensable test in making the determination as to whether or not the particular conduct encountered is calculated to raise the inference of a consciousness of guilt. And in this connection, common experience dictates that oftentimes while an affirmative or a negative act of a party may not in and of itself justify such an inference considered in the light of the attendant facts and circumstances, an entirely different result is warranted." (II Wigmore on Evidence, Third Edition, 1972 Pocket Supplement, Sec. 278, page 50-51).

In overruling Delta's Post Trial Motions, the trial judge expressed the matter as follows:

> ". . . Juries may infer from evidentiary facts in accord with the common experiences of mankind in the circumstances . . . One who destroys evidence opens himself up to any legitimate inference argument – the destruction was for a purpose and the jury did not have to believe the unlikely story . . ." (32a)

The Circuit Court indicates no ruling as to the propriety of inference to be drawn from Delta's destruction of evidence. Using an approach to judicial review that appears to be as unique as it is improper, the Court ascribes to this destruction of evidence no significance other than a basis of speculation as to how the jury was persuaded to rule as it did. The Circuit Court has shown that its retrial of this case has resulted in its disregard of any inference that might logically or properly be drawn from it. Basing its conclusion upon such remaining evidence as it considered probative, it arrived at "the view" that the jury was in error.

Cockpit voice recorders are required in commercial airlines by Federal Aviation Regulations. The requirement has one obvious purpose – to permit and/or assist in the reconstruction of accidents. It was the testimony that the policy of Delta Air Line pilots is to erase their cockpit voice recorder upon the "termination" of each flight. There is no indication in the record that any FAA sanction would prohibit that practice. It also appears that there is no definition in Federal Aviation Regulations as to the "termination" of a flight. The trial court expressed its view in this regard as follows:

> "There should be no erasures until the last motor has run down at the terminal and the last passenger to disembark at that stop is off and nothing untoward has occurred." (22a-23a)

It must be made clear, not only to the Respondent in this case, but to all who would, through the expedient of destroying evidence, attempt to deprive courts and juries of the truth, that they do so at their peril. It must be made clear that the triers of fact may properly infer that he who destroys evidence has something to hide and that the evidence destroyed, had it been known, would have tended to disprove that which is alleged by the destroyed and to prove that which is alleged by his adversary. The announcement of such a rule by this Court would far more effectively discourage the destruction of such evidence than would the sanctions or penalties of a Federal regulation.

CONCLUSION

The decision of the Circuit Court is a manifest erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law." That decision clearly calls for protective and corrective action by this Court so as to make it known that intrusions into the right of trial by jury will not be tolerated.

The issues involved herein are of general interest, particularly to the airline industry and to those charged with the responsibility for the control of aircraft.

Respectfully submitted,

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APPENDIX

Civil Action No. 6901

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

GEORGE W. ROSENTHAL
Executor of the Estate of Marion R. Rosenthal,
Deceased,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant,

DELTA AIR LINES, INC.,
Defendant and Third-Party Plaintiff,

vs.

UNITED STATES OF AMERICA,
Third-Party Defendant

FINDINGS AND CONCLUSIONS [ON CLAIMS BY TWA AND DELTA AGAINST UNITED STATES UNDER FEDERAL TORT CLAIMS ACT]

(Filed June 1, 1972)

On November 6, 1967, at about 6:30 p.m., a Boeing 707, operated by TWA (carrying 29 passengers and a crew of 7) commenced its takeoff roll west on runway 27L at the Greater Cincinnati – Boone County – Airport in Northern Kentucky. The runway is 150 feet wide. The 707's width from wing tip

to wing tip is 130 feet. The runway is 7800 feet long. About 4500 feet down, that runway intersects with a north-south runway. At that time there was some work being done on the north-south runway and it was closed; as a matter of fact, it was barricaded some 200 feet from the intersection on each side. Immediately to the west of that intersection, and stuck in the mud, was a DC-9, operated by Delta. It had just landed. The Delta was facing somewhat north-northeast and its aftmost component, the end of its tail component or, perhaps more accurately, elevator — or whatever one might want to call it — was seven feet from the north edge of the east-west runway. It was dark; there was no moon. Visibility, in the lingo, was 15 miles. At or immediately after the Boeing passed the Delta, the Boeing aborted its takeoff. It ran out of runway, traversed some 425 feet of dirt thereafter, lost its landing gear and/or "flew a little," went over a road, etc., etc., and finally came to rest. One engine was on fire. While the 707 was not burned up, it was so "cracked up" that it was a total loss. Miraculously, no one was injured in the crash proper excepting possibly a passenger, Mrs. Rosenthal (she and her husband were paid passengers on the 707). She was injured either in the crash or in the evacuation. Mr. Rosenthal also was injured in the evacuation. Insofar as this record shows, no one else seems to have been injured, with the possible exception of someone who had a sprained ankle. Several days later Mrs. Rosenthal died.

Two cases were filed by the Rosenthals in this Court. One — a wrongful death case arising out of the wife's death and the other a personal injury case, etc., arising out of the husband's injuries. For our purposes, these cases were filed against TWA and Delta. The Defendants, using third party procedures, among other things, answered and denied negligence, etc., respectively, and asserted negligence a la the brother defendant and, among other things, asserted that the accident was due in whole or part to the negligence of the local controller. In other words, TWA asserted that the accident was due to the negligence of one or the other or

both of the United States and Delta and that each of them was responsible for the damage and loss of a plane. Delta, while denying any negligence, asserted that if it was negligent, its negligence was "secondary" or "passive" as contra-distinguished with the alleged negligence of TWA and/or the United States, which was asserted to be, variantly, contributory, "primary," "active," and based on those assertions, sought relief against TWA and/or the United States for any damages that it might be required to pay either the Rosenthals or TWA. Succinctly, then, both TWA and Delta asserted tort claims under the Federal Tort Claims Act against the United States, which should be characterized as variantly actions for "indemnity," or actions for "contribution," or aircraft loss.

This case in these ramifications might be described as an airline nightmare or a court nightmare, or a dream for a law school. It involved an accident which occurred in Kentucky. No one disagrees that basically the substantive law of Kentucky governs even in respect of the Federal tort claim and that such be adjustable to the extent that Federal statutes or regulations are expressive. *Gill* v. *United States*, 429 F.2d 1072 (5th Cir. 1970). And there are some expressions in the Federal regulations of relevance.[1]

We will return to Kentucky substantive law, but before doing so, there will be some departures.

The Rosenthals were residents of Ohio and fleetingly transient a la Kentucky. The parties to this case, impliedly at least, agreed to abide by *Fox* v. *Morrison*, 25 O. St. 2d 193 (1971) — meaning, that the law of Ohio was applicable to the subject of the damages recoverable in the death case. The Rosenthal cases were, of course, diversity cases, with the usual Erie rules. Procedurally Federal law applied. The principle got in the act in respect of the admission of evidence and the "discretion" already described in this record by reference to cases in the Sixth Circuit, which will not be repeated. For instance, one expert was permitted to point-blank express an

[1] Appropriate references will be made under "Conclusions of Law."

opinion whether the location of the Delta plane constituted a "hazard." An objection to the same question to another expert was sustained. Apparently arbitrary – yes, but one expert was being queried in the field of the meaning of a phrase and the other expert was being queried in the context of the ultimate question for the jury.

To return to Kentucky law, Kentucky case law is permissive of contribution between joint tort feasors who are "in pari delicto." Fortunately, the jury's verdict rendered unnecessary a venture – which has not been posed to the Kentucky courts – into the meaning of "pari" in a case involving both highest degree of care and ordinary care or proper care. Kentucky case law also distinguishes sharply between what is referred to as "primary or active" negligence on the one hand and "passive or secondary" negligence on the other hand. If two tort feasors be held responsible in Kentucky and the fault of one of them is primary or active and the other is secondary or passive, the latter may with success seek indemnity against the former; hence Delta's indemnity claim and/or contribution claim. Also hence, TWA's contribution claim at least insofar as the United States is concerned – since this case may not be over, by any means. To those who would for any reason delve into the Kentucky Law and/or to record the cases for such future use as they may be in this case, see:

Lexington Country Club v. *Stevenson*, 390 S.W.2d 137 (Ct. App. Ky. 1965);
Parker v. *Redden*, 421 S.W.2d 586 (do, 1967);
Brown Hotel v. *Pittsburgh*, 224 S.W.2d 165 (do, 1949).

See also, for an excellent treatment of the general subject:

United States v. *Acord*, 209 F.2d 709 (10th Cir. 1954) at 715.

The questions of fact in the various controversies between the Rosenthals and Delta and TWA were for a jury to decide; as was the ultimate relief to be granted. The various controversies between TWA and the United States and between Delta and the United States were and are for this Court to

decide. It requires no law training to recognize that, to a great extent, the same questions of fact are involved in both controversies. The case was tried in the presence of a jury – the United States was permitted to make an opening statement to the Court, but also in the presence of the jury, and was also permitted to cross-examine in the presence of the jury every witness called by the Rosenthals, Delta, or TWA. At the end of all of the evidence adduced by those parties, the United States determined that it would not produce any further evidence in its own case – and rightly so, since everybody who knew anything about it had been heard from. The questions of fact in the jury case were then submitted to the jury and the jury returned its verdicts. The parties thereupon agreed to submit the controversies between Delta, TWA, and the United States on written briefs rather than on oral argument.

The jury returned a general verdict in favor of the plaintiff in each of the Rosenthal cases against Delta. In the matter of the cross-complaint by TWA against Delta for the value of the airplane, the verdict was in favor of TWA. The damage award to Mr. Rosenthal was $45,000.00; to the Executor of his wife's estate, $105,000.00; and to TWA, $2,216,000.00. The jury therefore has decided:

(a) That TWA exercised the highest degree of care toward its passengers and/or that TWA exercised ordinary care, and/or that if it failed in either respect, it was not a cause of the accident; the same is true of a "both respects" failure;

(b) That Delta failed to exercise ordinary care – in Kentucky the more accurate word is "proper" – and that its negligence was a proximate cause of the accident;

(c) The amount of the damages suffered by the Rosenthals;

(d) That the damage to the 707 in terms of dollars amounted to $2,216,000.00.

Civil Rule 52 requires this Court, in respect of the claims against the United States, to separately state its findings of fact and its conclusions of law. As a matter of practice, this Court has considered that an obligation to detail every issue of fact and every question of law. Civil Rule 54(b) does grant a little leeway and in this case, this Court is going to take advantage of it. For pragmatic reasons, both in terms of legal pragmatism and otherwise, we will deal with just two questions of fact posed to this Court by this record. Since one of them will be determinative, it is the expressed determination of this Court – in the language of the rule – that there is no just reason for delay in determination of other issues and it is expressly directed that a judgment consistent with the disposition of this one issue of fact should be entered.

The two that will be dealt with are the value of the airplane loss and the negligence of the United States. The reason for the departure from the ordinary custom of this Court is this. As we have pointed out, if this Court were to decide every issue of fact involved in the tort claim cases, it would be called upon to decide a number of questions of fact which are identical to the questions decided by the jury. In TWA v. United States are these questions: Highest degree of care, ordinary care, proximate cause, active or passive. So are those questions involved to some extent in Delta v. United States. Under the Tort Claims Act theoretically and apparently the government is entitled to a reexamination of those questions, but should they be in this type of case? And/or to pose the opposite – suppose this Court at this time goes ahead and independently decides them and the subsequent history of this litigation would include a reversal of the Rosenthal verdicts and judgment. If one would ask what all this has to do with it, let him read *United States* v. *Utah Construction Co.*, 384 U.S. 394 (1966) and *Painters* v. *Edgewood*, 416 F.2d 1081 (5th Cir. 1969). From the former, this:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly

before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[2]

Finally, if any appellate court disapprove of the limited findings, it is always at liberty to tackle the repose problem and/or remand for a complete finding and conclusion.

The first question of fact is simple. The jury accepted the testimony of the sole expert who testified on the subject. So do we. The fair market value of the 707 immediately before the crash was $2,316,000.00; the fair market value of what was left was $100,000.00. The appropriate damage award for the airplane in whatever context the question arises is $2,216,000.00.

We cannot so shortly dispose of the second one, i.e., Was the United States negligent? It requires a narrative. In the course of the narrative references will be made to the action or inaction of TWA and Delta. At the moment and for the reasons above set out, these references are background and are not findings of this Court in respect to any question of negligence or proximate cause insofar as TWA and Delta are concerned.

On the day in question, the operating crew of the 707, consisting of a captain, first officer, and flight engineer, was changed at New York earlier in the day. A new crew boarded at New York and that crew was to take that plane from New York to Cincinnati and from there on out west. The plane had a log book. On several occasions earlier that day, during operation of the plane, "compressor stalls" were experienced in one or the other of its motors. The previous crew had noted it in the log book. To the ordinary man a "compressor stall" may be likened to backfire in an automobile. It is related to the operation of an air compressor and the stall is accompanied

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[2] A fortiori—"judicial agency."

by a loud noise and sometimes by a flash.[3] Obviously, it was considered by one crew important enough in the operation of a carrier held to the highest degree of care to write it in the book. Insofar as the new crew was concerned, it seems that the captain looked at it and flight engineer looked at it, but the first officer did not and neither the captain nor the flight engineer said anything to him about it. The captain flew the ship from New York to Cincinnati and at that point instructed the first officer to take he' off from Cincinnati. Let's just say that should ring a bell – and the bell will get louder as we go along.

The 707 landed at Cincinnati without incident, was unloaded and loaded, and taxied out to the east end of the east-west runway, where it held for what checking is done at that point. Shortly before the local control tower had cleared the Delta DC-9 to land on the same runway – its approach to the runway being, of course, from the east. The 707 reported it was ready for takeoff just a second or so after the Delta had been cleared to land. The Delta passed over the east end of the runway and landed. When it did, the 707 was at the east end of the runway, in position to take off and holding. As the DC-9 approached the intersection of the two runways some 4500 feet down, he asked the tower if he could make a short

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[3] A compressor stall in one engine of a multi-engine plane has no more effect on the operation of the craft than would a backfire of an auto engine or the single "cough" that one encounters occasionally in accelerating or decelerating an auto. Nonetheless it is a significant enough occurrence to be noted in an aircraft log. It (a "compressor stall") is accompanied by a loud "pop" which can be heard above the sound of four jet engines at full throttle and heard by the pilot. It could well be mistaken for the sound that would accompany the contact of a fast moving object, (e.g., a wing tip) with a stationary object — as happened in this case — not the "contact," the "mistake" de facto.

One of the known causes of "compressor stall" in a jet engine of the type involved here is the engine air" intake" or "injest" system encountering "jet blast" or "jet exhaust." That is not surprising — since the system is suddenly and momentarily confronted with air in relative fast motion and at considerably higher temperature.

one eighty, meaning a U-turn. There is nothing unusual about that. The controller then knew that the DC-9 was in the general area of the north-south runway and the taxiway, so the tower replied, "Uh yeah, you can turn off right there." Delta acknowledged and the tower cleared the 707 for take-off and the 707 acknowledged.

Several things parenthetically at this point. These radio communications were heard by all concerned. In addition, each plane carried a voice recorder which records for our purposes what is said and/or heard in the cockpit and each plane carries a flight recorder, which records a great deal of information with respect to the activity of the airplane and various of its components, so that there really is not much question of fact what happened here. The problem is of inference – we might say many inferences. There are three exhibits in this case which correlate to a great extent various activities and broadcasts, etc., and we will not attempt to refer to them in detail. More about the Delta voice recorder later.

It will be noted that the TWA was initially cleared to take off prior to the time there is any indication that the DC-9 has actually left the runway. There is nothing wrong with that at all. By regulation (C.F.R.) clearance is "an authorization by Air Traffic Control for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled air space." The fundamental purpose of a local controller is to maintain separation between aircraft within the area of his jurisdiction. In doing so, he may anticipate, under the regulations. The regulation under the heading of anticipating separation states:

> "Take off clearance need not be withheld until prescribed separation exists, if there is a reasonable assurance that it will exist when the aircraft starts takeoff roll."

This, then, was an anticipated separation. The controller having done it, did what he was supposed to do. He scanned the runway about to be used by the 707 and noticed that Delta

was apparently not moving. So, nineteen seconds after the clearance had been granted 707, the controller asked this of Delta: "Delta three seventy nine you're clear of the runway aren't you?" He got this answer immediately and the immediacy is of significance: "Delta 379 Yeah we're in the dirt though."

Now, let's stop there and see what the situation was. There are runway lights along the east-west runway on both sides. Their intensity was proper (meaning that they do have variable intensities but no one claims that any of them were underlit). However, these runway lights are some 150 feet apart; they are some 18 inches off the ground; they are intended, not to light up objects on the runway or near the runway, but to mark the boundary of the improved runway for pilots landing and taking off. They are "pointed", in accord with that intention. The general area where this DC-9 was, was 3/4ths of a mile away from the tower. It was dark. The tower did have some binoculars available, but they were of the ordinary type that find use in the day time and hardly ever at night, for reasons which anyone who has binoculars knows. The tower was not equipped with any of the modern infrared stuff and no one claims that it should be. The Delta plane had some lights on it at the tips of both wings and at the tail and at the two rotors and all of which leads to one of the claims that the tower should have seen just where Delta was. The other claim of negligence leveled against the tower that if he could not see, he should have found out just exactly. For a next step, we might pose this: He certainly was under no obligation to get into a Suzuki and run out there. The fact of the matter is that the tower did know that Delta had apparently stopped and did know that he was stopped somewhere in the general area of the intersections of the two runways and the tower was apprehensive that Delta could be either on the runway or close to it, but certainly the tower had no way of ascertaining whether Delta was on the runway, or 7 feet away, or 70 feet away, or 100 feet away. So, he did what a reasonable tower controller would have done under

the same or similar circumstances – he asked. It is uncontradicted in this record that local controllers not only ask aircraft operators as a matter of some practice just where they are, but also having received an answer, rely on it and issue other clearances accordingly. The example easiest to understand is this: Many times planes land in mist or fog, which does not amount to subminimal conditions, but which are such that an airplane cannot even be seen from the tower after it is landed. Under such conditions, of course, the controller is practically utterly dependent on the pilot. Now, what answer should Delta have given? Delta should have answered, "Our rear end is so close to the runway that we don't know just where we are, and what's more, we are stuck in the mud and can't do anything about it." The fact of the matter is that the Delta crew exercised judgment which eventually proved to have been right in the sense that no part of their airplane extended over the runway; there was a seven-foot clearance. That was no time for judgment; it was a time for knowledge. The quick answer, "Yeah," indicated knowledge. The foreseeable result of that answer, known to Delta, was that, in a matter of some 30 seconds, a thing weighing 200,000 pounds, carrying 36 humans, and having a wing spread of 130 feet, was going to pass just to its rear, operated by only a human, at a speed of something in the neighborhood of 160 miles an hour – that is 250 feet per second. This record does not indicate how many humans there were in Delta. We can only repeat that sometimes the exercise of judgment is in and of itself negligent and this sure was one of them.

There is a great deal in this record on what one means by "clear of the runway." The term "off the runway" has been the subject of Washingtonian definition in regulations and it simply means that there is no part of the aircraft on the runway. It is even illustrated in the book and then one can go round and round on whether that illustration is a moving or a non-moving aircraft. It it had been moving normally, Delta was off the runway when it made the answer. "Clear

of the runway" has not been the subject of a Washingtonian definition. The words "clear" and "clearance" are used probably a thousand times a day in airports. Strangely there is some claim that the tower was negligenct in using that term rather than "off the runway." What "clear of the runway" means is exactly what it says, and that is that insofar as any aircraft is concerned, it presents no problem to anyone who wants to authorize the use of the runway for takeoff or landing; nor does it present any problem to anyone who is going to decide whether to take off or land. It means – "You are safe, go ahead and clear it for the next fellow; he is safe." The mere proximity of Delta to this runway was obviously – not only hindsight but res gestae – dangerous. Witness:

(a) When TWA got to the point where they saw where it was, their reaction was, "Not very damn far off the runway, is he."

(b) Delta's immediate concern – within several minutes after TWA passed it and as soon as they knew of the abort – was: "I just wonder if, if us sitting here – I don't know. Shhh! Voice Recorder – Sure it's running." More about that later.

(c) A passenger on Delta thought the pilot ought to be congratulated for getting out of the way of the 707.

(d) An experienced Delta crew man was impressed with the closeness of the passage.

(e) Anyone who has ever operated ten tons of something capable of 10 miles an hour within something like 7 or 17, if you please, feet away, has problems. This accident is proof positive.

Nor is proximity objectively the only factor in this situation. At best, just at the time TWA passed, Delta was at idle power. There was more than a hint in this record that Delta was still trying to get out of the mud which would have meant much more than idle power. It will come as something of a surprise to some perhaps that a jet engine – the type that the DC-9

was equipped with, and it had two of them – at idle power, sets up behind it an exhaust (wind, if that be the proper word), or blast, which at 75 feet in back of the engine has a velocity of 40 knots – more than 45 miles an hour. This jet exhaust has a temperature of 30°F. higher than the air around it. At 200 feet, the velocity is 30 and the temperature difference 5. We will leave it to someone competent in the mathematics field to transpose those figures to these distances:

(a) 34 feet, the approximate distance between the rear of the engines and the runway;

(b) 44 feet, the distance between the rear of the engines and the tip of the 707's starboard wing;

(c) 63 feet, the distance between the rear of the engines and the outboard starboard 707 engine.[4]

To further appreciate the situation, a mathematician might be interested in this – there is no requirement that a jet taking off stay exactly in the center of the runway. It is, of course, highly desirable and generally accomplished, but the plane taking off is free to come down one side or the other and in fact one of the criticisms of TWA was that it did not move over to the south side of the runway. From end to end, the landing gear, crosswise on the 707, is less than 30 feet, so suppose the 707 had decided ab initio to come down the north side of the runway. In any event, this record is uncontradicted that there is a relationship between jet exhaust and compression stall involving another jet engine. All of the airmen involved in this case, including the tower, were conscious of the fact that jets do exhaust – every school boy knows that – and they were all conscious of the fact that jet exhaust can affect the operation of an aircraft in proximity. True, it is a matter of condition. It is no problem to one aircraft moving two miles an hour behind another one on a taxiway,

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[4] See Delta Ex. 26 which does provide the answers for "at 63 feet" and does include the cone involved.

but such were not the conditions here. It is also a matter of common knowledge that variants in temperature affect lift and therefore response to control and that is true of crosswinds. For instance, one airline requires that its captains, rather than first officers, take off if the crosswind exceeds 15 knots. Again, there is a difference because the jet exhaust is conical and affects a relatively small area encountered by a fast moving plane for only a brief (infinitesimal) lapse of time, but no one will say that there is *no* effect.

The tower acted on the information and immediately cleared TWA the second time to take off, picking up the language, "He is clear of the runway." Again, we repeat, that each of the parties involved in this case heard everything that the other one said. It is at this point, of course, that one must come to a conclusion on the question of whether or not the local control operator was negligent. Concededly he was aware of the danger of proximity and concededly he was aware of the danger of jet exhaust; however, tower operators are not experienced airmen and nobody claims they are or should be. This operator has had a few rides in commercial airliners to broaden his experience. In the cockpit of the aircraft that told him he could go ahead and clear another aircraft for takeoff was the experience of an aggregate of thousands upon thousands of command and first officer experience, not only in jets and not only in commercial airliners, but in all kinds of ships in all kinds of places in the world. The tower was within its rights and within the ordinary practices of ordinarily prudent towers, and within the practices of properly trained local controllers exercising proper care, to accept the firm information from Delta and clear TWA. In this connection, two other things: A clearance is not a mandate, and that needs no citation of authority. The eventual determination of whether to take off or act on any clearance is the ultimate responsibility of the pilot in the plane about to act on the clearance and that needs no citation of authority. TWA knew everything the tower knew and had every capacity to communicate with Delta. It acted on what it knew and

again it represents thousands upon thousands of flying hours. A tower is not a kindergarten teacher, nor is it dealing with kindergarten children.

Finally, the expert testimony in this record is in absolute agreement that an ordinarily prudent commercial airline pilot, given the clearance TWA was given under the circumstances surrounding this case, would have started his takeoff roll. We quote these answers to the fairly put hypothetical question, as an example:

> "• • • under those conditions I think he was proper in doing so.
>
> "• • • I don't feel that they would have had any requirement to call the tower or call the DC-9 aircraft for further information about its position or condition. • • • They were free to go ahead with their takeoff without requesting any further information."

If the TWA pilot (charged with a commercial airline's highest degree of care) was free to act on the clearance under all the conditions, this Court would have extreme difficulty in arriving at any other conclusion with respect to a local controller (charged only with ordinary controller's care) in a circumstance in which each of them had exactly the same information – no more, no less.

To continue with the narrative – TWA began its takeoff roll immediately upon the second clearance. About one-half minute thereafter a number of things took place, for all practical purposes, at or about the same time. The tower requested somebody to come up from down below to the controller's office because there was a Delta off the taxiway into the dirt – the DC-9 asked the tower to let their company know that "we are stuck in the mud out here and bring our tractor out." The tower's answer was: "Yes sir we'll get somebody out there right away uh get things squared away on the runway here uh what are you just off the runway into the dirt sir." The answer from the DC-9, "Yeah just to the side of the taxiway." We are aware that as a matter of semantics,

it may be reasoned from this that the runway was actually involved and the tower knew it and he also knew that the DC-9 was just off the runway. That is a matter of semantics. In the first place, that is the first announcement of "stuck in the mud." In the second place, there happened to be two runways right there and one of them was usable as a temporary taxiway to a permanent taxiway. What runway who was talking about and what taxiway who was talking about was a matter of extreme speculation. The tower had clearly authorized a U-turn and an exit using the north-south runway to the permanent taxiway. It was in the process of making the U-turn and doing just that, that Delta got into the dirt. How it got there involves a long explanation not pertinent to this case, except in this context perhaps – at some point in making the U-turn, the Delta crew stopped and judged that the nose wheel – almost underneath the crew – was three feet from the end of the runway and they could complete the turn. The plane then started again and obviously did not complete the turn. It certainly should have occurred to somebody who had just made an error in judgment involving three feet and something underneath him that he ought to be the last person in the world to exercise a judgment with respect to where the tail of the aircraft was – involving 50 times greater a distance and an unseeable. This Court would not go from speculation based on the tower's post-clearance announcement to a conclusion that anyone satisfied any burden of proof. At just about this same time – about 35 seconds after the start of the takeoff roll – the 707 crew actually saw the Delta in its own lights. The TWA captain's comment was "not very damn far off the runway" and the first officer, then actually in control, replied, "Sure as hell isn't." At that point, TWA was about 1200 feet from Delta. It was moving at at least the speed of 250 feet per second. It was moving in excess of 130 knots an hour and something between 130 and 140 knots an hour and the latter is about 160 miles an hour.

Once again we must depart from the narrative. Confining the matter to who does what on this kind of takeoff at that

time – meaning who is supposed to do what – the captain who is seated on the port side, whether he is going to make the takeoff or not, handles the controls up to the time a speed of 80 knots is reached. Up to that time the direction pends on the nose wheel and the nose wheel control is at the captain's left. After 80 knots, the direction of the plane could be controlled by its own rudder, so at that point the captain announces, "80 knots," and turns the controls over to the first officer. This 707 reached 80 knots in about 22 seconds.

The captain so announced and the first officer – "Got her."

Now, before the takeoff is ever initiated, there is a determination made by the crew of the speed which is called "V-1." The basic purpose of that computation is this: Suppose a motor fails during takeoff, what is one supposed to do? That depends on all kinds of things which go into the computation, a number of which are sufficiently obvious that they need not be stated, nor need the remainder. The point is that there is a speed short of the attainment of which a motor failure should be followed by an abort, because the chances are that you are going to stop before you hit the end of the runway if you do it right, and the chances are that everybody involved will be hurt less that way than if you try to go ahead and take off. On the other hand, if a motor konks at or after you have attained that speed, under the circumstances as precomputed, you should go ahead because the chances are that the plane will fly and in the balances there is less danger in going ahead than in trying to abort – if you try to abort, you are not going to do it successfully. The V-1 speed of the 707 as computed was 133 knots and this aircraft should have reached that at about 4000 feet and about 35 seconds after take off was initated. It did. The captain was supposed to call out, "V-1." Of course, whoever is flying the thing is supposed to keep on doing some general scanning of everything, including the air speed indicator on his side, and this call-out by the non-flying of the two is to make sure that the one in charge of the controls realizes it and will be governed accordingly. No one called out "V-1" during this takeoff roll. Under ordinary cir-

cumstances, any ordinarily prudent captain would have so done when the first officer was controlling the takeoff.

Now, with respect to this V-1 – there is also a a great to-do in this record that it is a mandatory thing in the sense that if you go past V-1 you have to keep going no matter what. Obviously that is not so. So, one does not go from abort only to negligence. If some unforeseen event would take place, such as some major structural failure, or such as hitting something, e.g., a couple of birds, or such as an unknown and unannounced aircraft coming in for a landing at the other end of the runway, etc. etc. – obviously it is a question of what the reasonably prudent carrier pilot would do under the same or similar circumstances – it is a matter of judgment. As a matter of fact, the 707 had not attained V-1 when its lights disclosed to its crew just where the DC-9 was and as a matter of fact if abort had been initiated promptly upon that sight, it probably would have been successful. Again, it is a matter of judgment under the circumstances.

Then, there is another precomputed speed which is called "VR." "VR" is the speed at which, to state it basically, the attitude of the wing is changed from the controls exercising pressure down to pressure up and when that is done, the airplane should fly. In this case that was 140 knots and that speed was reached at about 4500 feet along the runway and at about 37.2 seconds after initiation of takeoff. Under the circumstances here, according to all the rules, the captain should have announced "VR." He did not. The announcement V-1, followed by the announcement VR, is a double caveat against abort under normal conditions. While we are on these V's, there is another one – VLO – and that is the speed at which the airplane should actually be in flight in toto. That in this case was 145 knots and it should have been reached in less than a second and a half after VR, and the probabilities are that this airplane reached that speed some time before the throttles were pulled back.

Now, we have taken several pages to describe what happened at or about the same time. It happened in 1/10th the

time it takes to read it – or perhaps a much smaller fraction. So, to return to the narrative and still within that fraction, let's go on. About five seconds after that "not very damn far off the runway," the 707 captain said, "See that fire in the end," and that was followed practically instantly by the sound of a "pop" – and to go clear back whence we started in New York, it sounded like and probably was a compressor stall. In other words, the foreseeable for this airplane at that time – loud bang and flame – took place. Immediately two things, in practical if not exact temporal concurrence:

(1) The first officer, in charge of the ship, hearing the "pop" and noting some slight aberration in the usual responses of his own aircraft, exclaimed, "Good God I hit him." As a matter of fact there was no contact between the 707 and the DC-9. The first officer judged the "pop" sound to be the result of and indicative of contact – extent unknown. The "pop" was the result of a "compressor stall" and the stall was probably induced by the encounter of one of the 707's engines with the jet exhaust of the Delta idling engines.

(2) Full brakes were applied on the 707 while the throttles were being closed. That is the first procedural step in the abort of a takeoff. Thereafter the usual procedures involved in an abort followed – the spoilers went up to destroy lift, and to put the nose down and to keep pressure between the landing gear wheels – both quantity-wise and width-wise – and the runway to increase the effectiveness of the brakes. Reverse thrust was initiated and carried forward.

Ideally perhaps these procedures could have taken place faster – whenever a procedure is to be knowingly practiced, it takes place faster than when it is called for unexpectedly. That is why athletes train, but even the result of years of training will not equate involuntary reaction with voluntary direction. In fact, these procedures in this instance took place within the limits of the manufacturer's expectations and we

certainly cannot say that that is not enough. Despite this, of course, the abort was not a successful one.

The jury has found TWA in all of this exercised the highest degree of care which it owed to its own passengers, or if it failed to or even if it failed to exercise ordinary care, that such was not a proximate cause of this accident.

We have dealt with some of the negligence claims leveled against TWA. The government in this lawsuit has claimed that the sole proximate cause of this accident was "patently" TWA's failure to abort when its crew first saw where Delta was. This Court is inclined to agree with the jury's disposition, at least from an ordinary or proper care point of view. It is one thing to Monday morning quarterback with figures and slide rules and readouts, etc. Practically at the same time that V-1 and/or VR were reached and should have been called out or noticed, what was noticed was the DC-9's exact location. The observation and comment time, let alone reaction time, was gone by the time of the "pop." If one would Monday morning quarterback, one might try this. Suppose abort had been initiated 1000 feet away, which is the most anyone could have hoped for. Once again we are dealing with the reactions of four motors and brakes and if all of them work as precisely as they are supposed to, we will get this 100-ton object by something even though we may only have 17 or 37 feet of clearance and even though we are going 150 miles an hour or thereabouts. But suppose they don't. Suppose there is the slightest aberration that pulls us toward, rather than away. In other words, it was a question of judgment under the circumstances.

Another claim of negligence leveled is this: That good practice requires – when a first officer is accomplishing the takeoff – that the captain guard the controls. On a number if not most of the airlines at or about this time, the decision of whether to abort was the captain's decision. In that sort of situation he surely should guard the controls. It was TWA's practice at the time, that the decision was that of the first officer if the first officer was accomplishing the takeoff. There

is some claim that that is wrong. However, TWA tried the other way for a while and, on one occasion before this accident, it lead to a debate between the first officer and the captain over in Rome on a takeoff with a tragedy resulting. More recently, one of the federal aviation agencies has had some occasion to deal with the subject, but that has been since this accident; so, the only fact of even slight import is that it is still being debated. Once again, that is a matter of judgment – there are things to be gained or lost by putting the decision in the hand of one person, i.e., the person handling the controls; and there are things to be gained or lost by putting the decision in the hands the most experienced member of the crew without regard to whether he is or is not handling the takeoff. As a matter of fact, in this case if the decision had been the captain's and/or if the TWA captain had been handling the takeoff, he would have continued the takeoff and not aborted.[5] The difference is in judgment and not in proprieties of care, excepting and unless it is a fair question what might have happened if someone had made the takeoff officer familiar with the fact that he might very well expect to encounter a compressor stall during his takeoff.

One of the regrettable features about this case in many respects is this: The voice recorder – at least the type in use then – is a thing which records at the most the last 30 minutes. In other words, it involves a revolving tape that, from beginning to end, will run 30 minutes. It will run over and over again, but as the tape arrives at a point 30 minutes away from the beginning of the recording, what went before is automatically erased. Stated another way – if you turn the thing on and run it for several hours, all you will find recorded on it is the last 30 minutes of sound in the cockpit. They were equipped not only with an automatic eraser, but a non-automatic one which anybody could activate and wipe

[5] In our humble judgment the first officer, having reason to suspect structural contact "did right" — a de facto error cost at most only one life. The opposite bet was 36 to 1.

off anything and everything that happened to be on it. The Delta pilots at least – and for all we know, maybe a lot more of them – sort of felt the government was unnecessarily watching over their shoulder and/or objected to surveillance of conversations dealing in some respects with what might be expected, so they obtained permission to erase at the termination of a flight. Evidently what is "termination" has not gotten a Washingtonian definition because some people construe it as when you reach the runway and some construe it as when you reach the taxiway and some construe it as when you reach the terminal and there is no authoritative construction on the relationship between erasure and running off the runway. In any event, no one will ever know what went on in the Delta cockpit during the first two, three, or four minutes between the time Delta first touched the dirt and the 707 passed the DC-9 and the abort took place and the aircraft crashed. Delta went into the dirt at 39.24. The 707 came to a stop a little more than a minute later, at 40.36. The reason no one will ever know is this – on the instructions of the Delta captain, the Delta first officer used the manual erasure system. The erasure completely blocks out what went on up until 43.51, but it was not a complete "res gestae" erasure. At that time someone in the cockpit said, "All those people are killed." And then someone said, "I just wondered if, if us sitting here - - - I don't know." And then someone said, "Shhh." And then someone said, I sure hope - - -." And then someone said "Voice Recorder." And then someone replied, "Sure it's running'." And then someone said, "We have nothin' really to speak of, etc., etc." Tantalizing, to say the least but in the light of the subsequent recordings, indicating Delta's doubt of its own judgment, surprise at how close TWA had come, this is proof positive that there simply had to be a considerable amount of talking going on during that three or four minutes. If nothing else, it points out the advisablity of a definition if one has not already been provided. There should be no erasures until the last motor has run down at the terminal and the last passenger to disembark at that stop is off and nothing un-

toward has occurred. Nobody is going to read them anyway unless a pertinent event has taken place, in which event irrelevant conversations may certainly be edited.

Conclusion–

As previously indicated, this Court arrives at no finding with respect to any of these ultimate facts–

(a) Whether TWA was negligent either in a highest degree sense or in a proper sense.

(b) Whether Delta was negligent in a proper or ordinary care sense.

(c) Whether (if either or both were negligent) either or both were *a* or *the* proximate cause.

It is the conclusory finding of fact of this Court that the local controller exercised proper care and did what an ordinarily prudent and ordinarily trained controller would have done under the circumstances; he did not fail to do something which such an ordinarily prudent controller should have done. It is not a burden of proof finding, although it necessarily means that neither Delta nor TWA has sustained the burden of proof. It is a finding based on preponderance of the evidence.

CONCLUSIONS OF LAW

The conclusions are limited to the questions of law involved only in respect of the Federal Tort Claims, i.e.,

TWA-Federal v. United States (for the aircraft loss).

Delta v. United States (for contribution or indemnification, the former amounting to one-half of the verdicts ($1,183,000.00) and the latter for the entire $2,366,000.00 (and costs, etc.).

Further, the conclusions are limited *only* to the issue of "negligence" of the United States, since there may be no recovery

for the aircraft loss – or via contribution or indemnification under Kentucky law – unless the claimants have established that the United States was negligent.

I.

TWA (and its subrogee – Federal) and/or Delta have the burden of showing by a preponderance that the local controller failed to exercise proper care on the evening involved, i.e., that the controller did something a reasonably prudent controller under all the circumstances present would not have done, or failed to do something such a controller would have done.

I. C. R.R. v. *Vincent*, 417 S.W. 874 (Ky. Ct. of Appeals, 1967).

II.

Each and/or both of claimants failed to so show. The preponderance of all the evidence in this case is to the effect that the local controller exercised proper care under all the circumstances present. That is not to say that the performance was perfect, nor that it could not have been improved upon, nor that a fact finder, with reason, could not conclude otherwise. However, while a fact finder may disregard expert testimony, an "ordinary mind" fact finder should not do so where the question is a proper one for expert testimony and the expert testimony, on all sides of a case, is in agreement.

III.

V-1 is the speed (accelerate-stop speed) by which, under ordinary circumstances, a decision to abort a takeoff should be made, so as to bring an aircraft to a stop on the runway.

14 C.F.R. 25.109 (formerly 14 C.F.R. 4b115).

IV.

The law of Kentucky applies to a Federal Tort Claims Act (i.e., substantive law).

Klaxton v. *Stentor*, 313 U.S. 487 (1941);

Baird v. *Cincinnati*, 315 F.2d 717 (6th Cir., 1963);
Goransen v. *Capital*, 345 F.2d 750 (6th Cir., 1965);
28 U.S.C. 1345(b);
Richards v. *United States*, 369 U.S. 1 (1969);
Arnett v. *Thompson*, 433 S.W.2d 109 (Ky. Ct. of Appeals, 1968).

The liability of the United States is affected by federal regulations which impose duties or standards on the conduct of employees of the United States.

Gill v. *United States*, 429 F.2d 1072 (5th Cir. 1970);
Thinguldstad v. *United States*, — F.Supp. — (S.D. O. E.D. – 1972).

V.

The pilot of each – the 707 and the DC-9 – was directly responsible for and the final authority as to the safe operation of his aircraft.

14 C.F.R. 91.3 and 121.533(d)(e);
American Airlines v. *United States*, 418 F.2d 180 (5th Cir., 1969);
Reidinger v. *TWA*, 329 F.Supp. 487 (Ky. 1971).

VI.

"Clearance" is an authorization by air traffic control for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled airspace.

14 C.F.R. 1.1.

VII.

A "clearance for takeoff" issued by a tower is *not* mandatory. It is permissive in nature. It does *not* relieve a pilot from exercising proper care in executing the clearance and/or deciding, for instance, to commence a "roll." The function of

the control tower is to assist the pilot in performing his duties and not to relieve the pilot of his duties. Once the pilot accepts the clearance, the operation of the aircraft remains the sole responsibility of the pilot, with which the controller is not to interfere.

American Airlines v. *United States,* supra;
Reidinger v. *TWA,* supra;
United States v. *Miller,* 303 F.2d 703 (9th Cir. 1962);
Airways v. *United States,* 283 F.2d 496 (2nd Cir. 1960);
Wenninger v. *United States,* 234 F.Supp. 499 (Del. 1964);
Gill v. *United States,* 285 F.Supp. 253 (Texas, 1960);
Wasilko v. *United States,* 300 F.Supp. 573 (N.D. O. 1967, aff. 412 F.2d 859 (6th Cir. 1969).

VIII.

"Clear of the runway" means – to take some alternative definitions–

(a) "Far enough away so that another airplane can safely use it for landing or takeoff."

(b) Sufficiently far enough away from the runway that the reporting pilot's aircraft would be no hazard to other aircraft operating on the runway.

(c) That the "runway is usable" – i.e., the reporting craft is no longer a factor in the flight of another aircraft using that runway.

The "clear" means not only "objective position," i.e., objective closeness, but includes from a "jet blast" point of view.

Under all the circumstances in this case, Delta was not "clear of the runway," but the tower acted properly in relying on the report and issuing a clearance. The tower did not abdicate any responsibility of visual observation. The tower could not reasonably have done anything more than it did to acquire knowledge of the location of Delta. The controller's problem, visualwise, was one of "degree." He knew before

issuing the second clearance, and as the result of his visual "scanning" after the "anticipation" clearing, that Delta was stuck in the mud and was not moving and was somewhere in the vicinity of the intersection of the runways three-quarters of a mile away. He had no way of knowing or telling whether the Delta tail was "on" or "off" or whether, if off, it was off by 7 feet or 70 feet or 100 feet. Visual observation and binoculars (not used) were not helpful – whether the problem be a "depth perception" or more accurately a "separation perception" he could at best only exercise the judgment of a person three-quarters of a mile away who could not see the fuselage of the plane – so he did the proper thing and asked the "experienced man on the spot" and having asked and gotten an immediate reply, he did the reasonably proper thing in relying on the reply.

It is pretty obvious that had the tower been informed by Delta that the aircraft's tail was "7 feet" from the runway or that "Delta did not know," the second clearance would not have issued. The quick "yeah" from the DC-9 indicated that it presented no problem to either an aircraft or its pilot using the runway for takeoff. The tower was under no duty to pursue the matter further.

IX.

A Federal Tort Claims Act case is tried to the Court, both as a fact finder and law determiner.

28 U.S.C. 2402.

We express no view on the application of the doctrines of res adjudicata or "collateral" estoppel or virtual determination in a consolidated trial – whichever be the first to "vis" in the "vis-a-vis" (court or jury).

X.

A duty to warn is not absolute. It exists when one individual knows, or in the exercise of reasonable care should

know, of the existence of a potentially dangerous situation and a second person is unaware of it. There is no such duty when there is no superior knowledge. In this case TWA and the tower had *equal* knowledge. The superior knowledge both opportunity-wise and actual was with Delta.

Durbin v. *Nally*, 263 S.W. 102 (Ky. Ct. of Appeals, 1953).

XI.

The tower's "anticipated" clearance was proper. There was a duty to "scan." The tower "scanned" and performed that duty.

A.T.P. 7110.8–p. 412.

XII.

The basic duty of a local controller is to, within the space within his jurisdiction (which includes the runway and its environs), space aircraft to achieve safe and orderly movement in flight and during landing and taking off.

Blaho Trans. p. 50.

Counsel are requested to prepare and present a judgment entry in accord with the verdicts of the jury and consistent herewith within 30 days. If counsel cannot agree on one in that time, then within that period each party may present its own proposed judgment.

Timothy S. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 6901

(TITLE OMITTED)

ORDER ON DEFENDANT DELTA'S POST-TRIAL MOTIONS

(Filed October 11, 1972)

Delta—post trial and judgment—has variously moved for

(1) Judgment n.o.v. in the Rosenthal cases.

(2) Alternately, a new trial in the Rosenthal cases.

(3) Judgment n.o.v. in the TWA case v. Delta.

(4) Alternately, a new trial in the TWA case.

(5) To set aside the judgment in Delta v. United States.

(6) Alternately, for a new trial in the case of Delta v. United States.

(7) To set aside the judgment in TWA v. Delta and alternately grant a new trial of that cross-claim.

The n.o.v. and the set aside motions are overruled without comment.

Enough, at least, and probably much too much has been written about this case and this Court pleads guilty as a participant. Only this: This accident never would have happened had Delta not been in a hurry to such an extent that

it ran off the runway. A reasonably prudent airline pilot does not run his aircraft off the runway in dry weather, let alone when it is muddy. This accident would not have happened if Delta had reported to the tower the fact, i.e., he was not clear of the runway and/or, if he was, he had no reason to think so. A reasonably prudent "seat of the pants" pilot—to say nothing of a commercial airline pilot—tells the tower what he knows and what he does not know. If Delta had acted with proper care in this respect, there would have been no clearance and there would have been no accident. Conceding all that Delta says with respect to the deficiencies of TWA, proximate cause is a thing for a jury and not for a court. No two judges ever agree on it anyway, in multiple circumstances.

Before disposing of the new trial motions, two items:

In this Court's Findings and Conclusions, filed June 1, 1972, in the 13th line of page 33 (Conclusion VIII) the language "stuck in the mud" should be changed "in the dirt." (See Findings of Fact on pages 11 and 18.)

The other item which deserves a phrase before this case leaves this Court is this: If anyone examining this record should be inclined to raise an eyebrow at the submission in this Kentucky-governed case of the assumption of risk issue, this perhaps will lower it. All counsel agreed to a charge requested by one party on the subject should be given.

The various new trial motions are based on three items—two being common to each of them. The first—Delta asserts it was erroneous, and prejudicially erroneous, to sustain a question posed to Delta's expert Captain Ball, seeking to elicit his opinion "as to the cause of the crash." This assertion is based on Civil Rule 43(a) and two relatively recent Ohio cases, particularly *McKay* v. *Rodman*, 11 Ohio St. 2d 77 (1967). The Delta expert was permitted to testify as an expert and given opportunities in areas comparable to that involved in the *McKay* case. That case involved a question whether a given weld was "proper" or in compliance with a given "order." The causation question is a different one. It does

not elicit the opinion of an expert on the relationship between a given thing and a given standard or a given act and a given standard. It attempts to elicit from an expert an answer to the exact $64 question before the jury. The Ohio Supreme Court has never overruled or criticized *Shepherd* v. *Insurance Co.*, 152 Ohio St. 6, or *Fowler* v. *Delaplain*, 79 Ohio St. 279, each of which is clear authority for the proposition that when one gets into the causation or real ultimate question area, the opinion of an expert should not be received since it invades the province of the jury. It is probably uncertainty in the States laws that has lead the Federal Circuits to evolve the "Trial Court's Discretion" Rule in the area. Two cases in the Sixth Circuit are quite pertinent. *Dickerson* v. *Elevator Co.*, 287 F.2d 255 (1961) was a causation case. However, it was a question of mechanical causation in which an expert was asked why a machine acted a given way. That is not this case. The machines in this case did not do anything wrong, except man-made. In this case the Delta expert was asked to pass upon the workings of the human mind. That is for juries, at least when the expert is not a psychiatrist.

The second case in the Sixth Circuit—more recent and clearly enunciating the discretion rule—is *Garza* v. *Indiana and Michigan Electric Co.*, 338 F.2d 623 (1964). This Court relied on that case in excluding the opinion and still does and thinks it applies.

The second error asserted as requiring a new trial is this: During the argument TWA's counsel argued that the pilots of the Delta plane were racing their engines in an attempt to blast their plane out of the mud at the time TWA passed and suggested that it was to conceal that fact that Delta erased its tape. Delta objected, asserting that that was an invitation to the jury to speculate since there was no evidence that the motors were racing and/or that if they had known such a claim was going to be made, they could have subpoenaed passengers and protected themselves. Once again, this Court disagrees. As we understand it, juries may infer

from the direct evidence of what is seen or done, or heard, and so may counsel in arguing. If that be not true, what would we be arguing for. Juries may infer from evidentiary facts in accord with the common experiences of mankind in the circumstances, for instance. In that sense, what does one do when operating something with a motor that gets stuck in the mud. The ordinary man accelerates whatever he has. Furthermore, everyone today knows that an idled jet engine does not move a jet aircraft or imbed its nosewheel in mud to the extent that it has to be hauled out with a tractor. An automobile will move at idle speed, or imbed wheels at idle speed, and a boat will do the same with its nose, but before any jet moves the idle must be increased. So, at some time after Delta went into the dirt, one or more of its engines were not idling. Again, what is argument for. To take another ground. One who destroys evidence opens himself up to any legitimate inference argument—the destruction was for a purpose and the jury did not have to believe the unlikely story. We say "unlikely" in view of the "Shhh," etc. As anyone who hears these tapes will observe, the one thing that is plain and audible on the unerased parts is the whine of the engines. Sometimes you cannot understand the words, but you can sure tell whether the engine is idling or pitched. It is the most prominent thing on the tape.

One last item. A passenger thought the Delta pilot should have been congratulated for getting out of the way of TWA. One does not "get out of the way" at idle. In short, this Court is rather convinced that the engine pitch argument was perfectly legitimate.

The new trial claims, not common to all of the cases, deal with the Rosenthal cases only. This claim is that the damages are so excessive as to indicate passon and prejudice. In the wrongful death case, the jury's verdict was $105,000.00. The decedent was 71. She had suffered from asthma and some form of Parkinson's disease for a long time. Her life expectancy was 12.37 years. She was survived by her husband who was 79, had a life expectancy of approximately seven

years, and had been retired for some 15 years. The jury verdict in respect of Mr. Rosenthal was $45,000.00. He did suffer a compression fracture of a dorsal vertebra; he was hospitalized for approximately three weeks and went through a period of convalescence of approximately three months. There was affirmative evidence of a limitation of activity in the recreational field and who can say that a person able to play golf at 75 will not be able to at 85 or 90—that is for a jury. This Court certainly cannot say, as a matter of law in today's economy, that the verdict is not within the reasonable realm of compensation. Juries are pain evaluators—not lawyers or judges.

To return to Mrs. Rosenthal. She was survived by her spouse to whom she had been obviously happily married for many, many years; by a married daughter; by children of a deceased son. She had never had any earned income in the income tax sense and it is true that about the only evidence in this case touching on "pecuniary" in the street sense was that she periodically made "tax gifts" to her daughter and grandchildren. But "pecuniary" in the street sense is not the end of the story. This jury was correctly charged on the damages to be awarded in a wrongful death case. The Ohio statute is a little unusual and it deserves a specific mention. It provides, in the pecuniary area, of course, for the award of such damages "as it (the jury—not the court) thinks proportionate to the pecuniary injury resulting to the persons, etc." As recently as last year, an Ohio Court of Appeals, in *Nelson* v. *Horton*, Ohio Bar, August 21, 1972, (Clermont Co.) said this:

> "The section confers wide discretion on a jury in determining the pecuniary damage in the wrongful death of an infant."

The reason is, of course, as applied to an infant the parent is entitled to the services of the infant. In the *Nelson* case, the infant was four years old, never did anything but get in his parents' way. As in this case, there was absolutely nothing

pertaining to the pecuniary in the street sense. A judgment entered on a verdict for $4,500.00 was affirmed. The Court of Appeals quoted from a Supreme Court of Ohio decision this:

> "There can be no exact or uniform rule for the determination of the value of services or assistance which the deceased child would have rendered had death not intervened. Factors for consideration are the age, sex and physical and mental condition of the child and the position in life, occupation and physical condition of the parents. The value of the services is to be estimated on the basis of what children in the same condition and station of life and of like capabilities are ordinarily worth * * *."

In this case the jury had before it the various factors referred to above. Just as it is the law of Ohio that a parent is entitled to the services of a minor child, so also is it the law of Ohio that a husband is entitled to the services of his wife during what might have been her normal span of years and vice versa. See, for example, *Clouston* v. *Remlinger, Inc.*, 22 Ohio St. 2d 65 (1970), quoting Prosser on Torts—

> "The husband's interest in his relation with his wife first received recognition as a matter of her services to him as a servant, etc."

The rationale of the *Nelson* case applies. While it is true that in an intervivos loss of corsortium case in Ohio the only recovery in the services area may be for amounts paid a substitute, this is not an intervivos—it is a death case. Compare 25A C.J.S. at page 933—

> "In an action for the death of a spouse damages for the loss of the services of the spouse generally may be recovered. * * *
>
> "In determining the amount, the award must be left to turn on the sound sense and deliberate judgment of

> the jury, and, in estimating the value of domestic services rendered by a wife, the jury may consider the value of many services incapable of exact proof but measured in the light of their own observation and experience. In computing damages for the death of a wife, the recovery should not be limited to the recovery of the cost of a menial servant or the amount the wife would have earned working, etc., etc., but these elements should be included along with recovery of the value of her services in counseling, advising, inspiring, comforting and otherwise serving her family as would reasonably have been expected of a wife."

Mrs. Rosenthal was accompanying her husband at the time of this accident and had accompanied him to Cincinnati for a visit just before. We cite this as an example merely. Who can say what company is worth except a jury.

Two final observations on this passion and prejudice point. For what it may be worth, this: A trial judge and/or a trial lawyer senses a jury passion or prejudice—there is always some indication of it somewhere along the line. There was absolutely none in this case. This jury did its job in a businesslike fashion and listened attentively to everything in this case, including very lengthy arguments. A prejudiced or passioned jury's attention wanders or reacts. This jury called it as it saw it.

Secondly, for tactical reasons which this Court would be the last to criticize, absolutely no argument was made on either side on the damages which should be awarded. This jury had nothing but the evidence and this Court's charge. The parties impliedly suggested just what the Ohio statute says: "What does this jury think?" The expression is no evidence of passion or prejudice.

The motions for a new trial likewise are overruled.

Timothy S. Hogan
United States District Judge

No. 72-2211

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE W. ROSENTHAL, EXECUTOR
Estate of Marion R. Rosenthal,
Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee,

v.

DELTA AIR LINES, INC.,
Defendant-Appellant.

APPEAL from the U.S. District Court for the Southern District of Ohio.

Decided and Filed January 17, 1974.

Before WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge. We consider the appeal of Delta Air Lines, Inc., (Delta) from a judgment entered upon a jury verdict awarding $2,216,000 to Trans World Airlines (TWA) and Federal Insurance Company (Federal) for damage done to a TWA Boeing 707 airplane in the casualty involved herein. The case was tried in the United States District Court for the Southern District of Ohio, Western Division.

At approximately 6:30 P.M., on November 6, 1967, a TWA aircraft (TWA) was commencing its takeoff at the Greater

Cincinnati Airport in Boone County, Kentucky, its destination Los Angeles. A Delta aircraft (Delta) was standing close to, but off of, the north side of the runway being used by TWA. As it proceeded, TWA passed to the rear of Delta, at which time the TWA pilot mistakenly concluded that he had hit the Delta plane, and attempted to abort (terminate) his takeoff. The speed of TWA, however, had then become such that the attempted abort could not be accomplished. There had, in fact, been no contact between the TWA and the Delta planes, and the TWA takeoff could have been successfully accomplished notwithstanding the presence of the Delta plane near the runway. The TWA plane ran off the end of the runway and was severely damaged. The plaintiffs Rosenthal – passengers aboard the TWA plane – were injured.

This action was brought by Rosenthal, individually, and as executor of his wife's estate. These claims, however, have been disposed of and are not involved in this appeal, except as they are involved in a cross-claim of Delta against TWA for indemnity or contribution as to the Rosenthal recovery against Delta. We are concerned primarily with the claims of TWA-Federal against Delta. In that claim, appellee TWA charged that the Delta plane had negligently stopped near the runway upon which TWA was making its takeoff run; that such proximity of the Delta plane was the cause of the TWA pilot's belief that he had hit the Delta craft and the ultimate crash of the TWA plane. The complex procedure of the litigation is correctly summarized in appellant Delta's brief:

> "Both the $105,000 judgment Rosenthal recovered against Delta as executor and the $45,000 judgment recovered by Rosenthal individually have been satisfied. That aspect of the cases is now closed.
>
> "TWA cross-claimed against Delta and the United States seeking damages of $4,845,000 for loss of its 707 aircraft. Delta cross-claimed against TWA and filed a third-party claim against the United States asking indemnity or contribution for any amounts Delta might be re-

quired to pay – since Kentucky law which controls here provides for contribution among joint tort-feasors.

"On discovery it developed that TWA had been paid $4,728,750 by Federal on the hull loss. The District Court thereupon granted Delta's motion to compel joinder of Federal as a real party in interest allied with TWA.

"As thus aligned the case came on for trial before Judge Hogan and a jury on April 24, 1972. The Rosenthal claims against TWA and Delta and TWA-Federal's claim against Delta were tried to the jury. The claims of TWA and Delta against the United States under the Federal Tort Claims Act were tried to the court. Delta's claim against TWA for indemnification or contribution was reserved with the understanding that should the jury return a verdict in favor of the Rosenthals against both TWA and Delta, the question of Delta's right to indemnity or contribution would then be submitted to the jury for determination.

"The evidence adduced at trial by TWA-Federal showed that while Federal had paid TWA $4,728,750 on the hull loss, the actual value of the 707 plane at the time of its loss was only $2,316,000 against which salvage of $100,000 was allowed leaving a net loss of $2,216,000. Delta did not dispute that amount.

"After ten days of trial the case was submitted to the jury on May 10, 1972. On May 12, 1972 the jury returned its verdicts finding in favor of Rosenthal (as executor) against Delta in the amount of $105,000; in favor of Rosenthal (individually) against Delta in the amount of $45,000 and in favor of TWA-Federal against Delta in the amount of $2,216,000.

"On June 27, 1972 the district court entered judgment on the verdicts; entered judgment in favor of TWA on Delta's cross-claim and entered judgment in favor of the United States on the cross-claim of TWA and the third-party claim of Delta.

"Delta has elected not to appeal the judgment in favor of the United States on Delta's third-party complaint and hence the Government is not a party to this appeal.

"The only issues on this appeal are those between TWA-Federal on the one hand, and Delta on the other. With respect to the $2,216,000 judgment against Delta in favor of TWA-Federal, the questions are whether Delta is entitled to judgment n.o.v. or in the alternative a new trial, and whether Delta is entitled to a new trial on its cross-claim against TWA which was not submitted to the jury because of the nature of the verdicts returned."

The questions presented for review are:

1. Whether the District Court erred in failing to enter judgment for Delta on its motion for a directed verdict on the grounds (a) there was no evidence that negligence of Delta proximately caused the crash and (b) TWA's evidence established conclusively that its own negligence contributed to cause the crash that TWA's pilots were aware of the presence and position of Delta's plane and assumed the risk.

2. Whether the District Court erred in failing to grant Delta's motion for new trial for error in (a) refusing to let Delta's expert witness state his opinions concerning the cause of the crash and other related matters and (b) permitting counsel for TWA-Federal to argue outside the record and invite the jury to base its verdict on conjecture.

3. Whether the District Court erred in failing to grant Delta a new trial on its cross-claim against TWA.

We reverse and direct entry of judgment for defendant Delta, dismissing the cross-complaints of TWA, and Federal Insurance Company.

We so rule for these reasons: the conduct of the Delta crew, if negligent, was not a proximate cause of the accident;

negligence or erroneous conduct of the TWA crew intervened to eliminate any negligence of the Delta crew as a proximate cause of the casualty involved; and the evidence established, as a matter of law, that negligence of the TWA crew was a contributory cause of the accident.

The runways upon, or adjacent to, which the controlling events occurred were identified as 27L and 18-36. Runway 27L, an active main runway at the time, ran from east to west a distance of 7,800 feet. It was 150 feet wide, paved and with high intensity lights off of, but immediately adjacent to the runway's pavement. Such lights were set at medium intensity on November 6. The TWA plane had a wing spread of 130 feet so that there would be 10 feet clearance on either side of the plane if it were travelling in the exact center of runway 27L. At a point slightly better than halfway from the east end of runway 27L, such runway was intersected by a north-south runway designated 18-36 which, at the time was unlighted, not in regular use, and under repair; it was, however, usable as a means of exit to the north from runway 27L. The Delta plane had made a landing on 27L, and its captain was intending to use 18-36 as a means of clearing 27L for use for landing or takeoff by other planes.

The Delta plane – Flight 379 – was a DC-9 two-engine jet aircraft, with its engines mounted in the tail. The TWA plane – Flight 159 – was a Boeing 707 four-engine jet aircraft, with its engines mounted on the wings.

At approximately 6:38 P.M., Delta 379 landed on the east end of 27L and proceeded on that runway to the intersection of runway 18-36, where it intended to leave runway 27L. Advised that another plane was about to take off from east to west on 27L, the Delta crew requested permission from the control tower to make a 180° turn preparatory to exiting onto runway 18-36. Such a turn, the equivalent of a "U turn," was necessary to prepare to leave runway 27L because Delta had rolled slightly west of 18-36 (approxi-

mately half the airplane was past 18-36).[1] The tower granted permission to make the turn, and Delta proceeded to turn the craft to the right (west to north) until its nose wheel was a short distance from the north edge of 27L. The Delta Captain stopped the craft at that point in order to ascertain the distance of the nose wheel from the runway edge. He could not see the wheel (which was under the cockpit), but did estimate the distance between it and the runway to be sufficient to allow him to complete his 180° turn. Power was again applied, but instead of turning, the nose wheel locked in a 90° position and the craft moved in a northerly direction off runway 27L. The Delta captain continued to apply power until the craft came to a complete stop on the north side of runway 27L, its nose wheel imbedded in mud adjacent to the runway. The Delta plane was entirely clear of runway 27L at this time. Delta's engines were then shut down to idle, and they remained so until after TWA had passed the rear of the Delta plane.

While Delta was attempting its turn, TWA 159 was waiting to take off at the east end of 27L. At 6:38:16,[2] TWA was cleared to position and told to hold on 27L. Neither TWA pilot saw the Delta craft on 27L at this time. At 6:39:24, TWA was cleared for takeoff.

Seconds before the TWA takeoff, the airport control tower spotted Delta at the 18-36 and 27L intersection and noticed that it had stopped moving. He asked, "Delta three seventy nine, you're clear of the runway aren't you?" to which the Delta first officer replied, "Yeah, we're in the dirt though." Such

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[1] Although 18-36 was then under repair, it was usable as a taxiway to the airport terminal.

[2] The time sequence of events here involved was established by the evidence at trial. Representatives of the National Transportation Safety Board were able to correlate the transmissions recorded on both aircrafts' cockpit voice recorders with the aircrafts' flight data recorders. From this information, it could be determined, with some uncritical margin of error, the relevant speeds and distances.

communication as to Delta's position was received on the radio in the TWA cockpit. The following portrays the TWA Captain's knowledge on the subject.

"Q. Well, would a communication between an aircraft and the tower, which aircraft is either clearing, or in the process of clearing the runway or which you expect to take off, would that be a communication that you would consider applies to you? A. Yes.

"Q. Well, you wouldn't filter out that kind of a communication, would you? A. Well, I recognized that he reported clear of the runway and that was all the information I needed.

"Q. Well, we will get to that in a moment, I assure you, but we haven't got there yet and right now we are just talking about Delta 379's request to make a 180 degree turn while he was still on the runway, and the tower's authorizing him to make a 180 degree turn to clear the runway; whether you heard that, that is what I want to know? A. I think I must have.

"Q. And then coming now to the point which you have just been discussing, you did hear, did you, the request from the tower to Delta 379 asking him, 'Delta 379, you are clear of the runway, aren't you?' Or words to that effect? A. Yes, I heard that.

"Q. And did you hear Delta 379 reply, 'Yeah, Delta 379, yeah, we're in the dirt though,' or words to that effect? A. I did, but as I have said twice, what I got out of that was that he was 'clear of the runway,' I didn't get that dirt business at all.

"Q. And immediately after that communication from Delta 379 to the tower, the tower called your aircraft, is that right? A. Yes.

• • •

"Q. Well, without regard to what the particular words were, the tower gave you the information that 'he's clear of the runway,' is that right? A. Yes.

"Q. And you understood by that he was referring to Delta 379, not some other plane, is that right? A. Yes.

"Q. And then the tower went on to say that you were cleared for takeoff, is that right? A. Yes."

The Delta craft was in fact physically off the runway when the tower requested its position. Approximately seven feet separated the nearest part of the Delta plane and the runway edge. The construction of the Delta and the TWA planes was respectively such that at this distance the nearest part of the Delta plane which could be an obstruction to the passing TWA plane was 30 feet. However, when the Delta crew made its determination, neither Delta pilot was certain of the exact distance between its tail and the runway. When asked of the craft's position, the first officer, sitting in the right cockpit seat, turned to his side window and, using the runway lights as a standard, saw that the Delta plane was north of these lights, thus off the runway.

After TWA was told that the runway was clear, and that another aircraft was on final approach to land, TWA 159 proceeded to take off. The first officer, Ronald Reichardt, was piloting the flight, leaving the captain, Volney Matheny, with the co-pilot's duties. However, until the craft reached a speed of 80 knots, the captain controlled the steering of the craft with a nose wheel steering wheel. At the speed of 80 knots, he would call out this speed and thereafter the first officer would control the steering with the rudder pedals. This procedure was followed on TWA Flight 159.

In addition to calling out the 80 knot speed, it was also the co-pilot's duty – Captain Matheny on this flight – to call out various critical speeds in addition to 80 knots. The purpose of this procedure was to enable the pilot to give his complete attention to the runway, while the co-pilot attended the instrument panel. The first of these critical speeds to be called is "V_1", known as the decision speed, or the last speed at which the craft can successfully stop within the confines of the runway. The second speed, "V_r", is the rotation speed, where the pilot rotates the craft by pulling back on the

control wheel, thus elevating the nose to become airborne. On this particular flight, TWA's V_1 speed was computed to be 132 knots, and V_r was 140 knots.[3] It was undisputed that the TWA captain failed to call out these relevant speeds, and the evidence showed that TWA had reached and was exceeding the V_1 speed before it passed to the rear of Delta.

TWA's captain and first officer made a conscious observation of the position of the Delta plane when they were 1,200 to 1,400 feet from it. As they had been advised, it was north of and clear of runway 27L. When they saw it, the TWA captain remarked, "Not very damn far off the runway," and his first officer rejoined, "Sure as hell isn't." Both of these officers testified from their own observations that the Delta plane was then "clear of the runway." The fact that it was "not very damn far off the runway" did not then prompt either of them to take or direct action then available to them to avoid whatever hazard, if any, the position of the Delta plane presented. Instead, they continued accelerating their speed for takeoff.

TWA proceeded west on 27L and passed the Delta craft. TWA's first officer, then in control, testified that as it came abreast of Delta there occurred a loud report (a popping noise) from the right side of the TWA craft. Hearing it, the first officer assumed he had hit the Delta craft. The TWA craft had in fact not come in contact with Delta; rather, the evidence tended to show that TWA may have experienced a compressor stall in its outside engine on the starboard wing (the wing nearest to Delta). A compressor stall is not an uncommon event; it sometimes may occur when a jet aircraft travels through the jet exhaust of another, and it usually causes only a momentary pop in the engine. If such a compressor stall does occur, it does not impair the controllability of the plane.

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[3] A knot is defined as, "[a] unit of speed, equivalent to one nautical mile, or 6,080.20 feet, an hour." *Webster's New Int'l Dictionary*, 1372 (2d ed. 1959). By using the formula of 1 knot equals 1.151 miles, 132 knots is translated into 151.93 miles per hour (or 223 feet per second), and 140 knots is equal to 161.14 miles per hour (or 236 feet per second).

There was evidence that earlier the same day the TWA plane, then manned by a different crew and on a different leg of its day's flight, had experienced several compressor stalls, not caused by any outside agency such as going through the jet exhaust of another. No direct evidence was presented that the "pop" of a compressor stall on the involved TWA plane, if such actually occurred while passing the Delta plane, was caused by the jet wash from the Delta plane.

When the TWA first officer heard the popping noise, he initiated abort procedures. At that time, the speed of the TWA craft had already exceeded V_1, the last speed at which a successful abort could have been accomplished. The decision to abort was entirely that of the first officer, and it was made without his knowing or seeking to know the speed of the plane, and consequently without any assurance that it could be safely done. Such lack of awareness was the direct consequence of Captain Matheny's breach of his duty to call out the critical speeds.

The TWA Boeing 707 Flight Handbook contained the following:

> "a. Aborting a takeoff at high speeds is potentially dangerous and should not be attempted unless an actual engine failure has occurred *prior* to V_1. Under the balanced runway length concept an abort at V_1 that is perfectly executed will require every foot of the remaining runway. Anything less than a maximum effort throughout the entire stopping attempt will probably result in running off the end of the runway. Barring an actual engine failure (prior to V_1) *the aircraft has a greater capability to successfully continue the takeoff than to stop.*"
>
> "b. *If an engine failure, or other abnormal indications, occurs after* V_1, *continue takeoff using the same technique as for a four engine takeoff.* To maintain directional control, be alert and aggressive on the rudder. Some aileron control may be required." (Emphasis supplied.)

Similar information was contained in the TWA Transportation Training Bulletin No. 66-9:

> "Considering a condition of maximum weight for the runway, and, the balanced runway length concept, *an aborted takeoff at V1, that is perfectly executed will require all of the remaining runway to effect the stop. Any thing less than a maximum effort throughout the entire stopping attempt will probably result in running off the end of the runway.*
>
> "V_1 is referred to as 'decision speed'. *On takeoff, it is the First Officer's duty to call out* V_1 *and* V_r. *Once the rotation has started, the takeoff should be completed. Aborting a takeoff at high speeds is potentially dangerous and should not be attempted unless an engine failure has occurred prior to* V_1.[4] Engine failure will manifest itself by either yaw or loss of performance indicated by multiple engine instrument indication. Many times a takeoff has been aborted unnecessarily on a single, unconfirmed indication. Unless an engine failure occurs before V_1, the aircraft has a greater capability to successfully continue the takeoff than to stop. Remember, all runway take off charts are based on one engine becoming inoperative at V_1. Before attempting an aborted takeoff, be certain the abort is necessary.
>
> • • •
>
> "V_1 has been referred to as the 'decision speed.' It is interesting to note that two seconds are allowed for this decision. By definition, V_1 is the speed at which point the pilot is offered two prerogatives, to continue, or to stop. Considering that the aircraft is loaded for the runway, it is only at this point that the aircraft has the capability of doing either. Below V_1 the aircraft does not have the capability of accelerating to the required lift

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[4] There was no evidence that the TWA plane, before or at the time of passing the rear of the Delta plane, experienced "an engine failure". If it be assumed that the noise or "pop" which led the first officer on TWA to believe he had hit the Delta plane, was a compressor stall, such an event was not "an engine failure."

> off speed and clear the runway end at 35'. *Above* V_1 *the aircraft does not have the capability of stopping on the runway remaining.*" (Emphasis supplied.)

The evidence showed that before and at the time the decision to abort was made, the TWA plane had reached a speed of 143 to 145 knots, substantially above the V_1 speed of 132 knots. Thus, the abort was attempted notwithstanding the above quoted rule that "above V_1, the aircraft does not have the capacity of stopping on the runway," and the Flight Handbook admonition, "If an engine failure, or other *abnormal indications*, occurs after V_1, continue takeoff using the same technique as for a four engine takeoff."

TWA Captain Volney D. Matheny, a pilot of much experience, had never met his first officer, Ronald Gene Reichardt, a younger and less experienced pilot, 27 years of age, prior to the day of the flight in this case. No discussion as to procedures or division of responsibilities in accomplishing the planned takeoff was had between these officers. The log on the TWA plane recorded that compressor stalls had occurred earlier in the day in question. Captain Matheny testified that he had read the log prior to takeoff, but could not remember the notation of compressor stalls. The first officer, who was aware that he would be in control of this flight, did not consult the log, even though TWA regulations required its pilots to examine the airplane's log before undertaking to operate it. In all events, there was no evidence that a compressor stall, if one occurred, would, or did, impair the handling of the plane.

TWA's first officer Reichardt testified that he heard "a loud report from the right hand side of the aircraft [the TWA plane], felt some roughness as I crossed abeam of the aircraft [the Delta plane]," and further [t]hat, in combination with our closeness as to the vicinity of the aircraft [the Delta plane], led me to believe I had possibly hit the Delta aircraft." Other than these observations, there was no evidence that the Delta plane was a hazard to or in any degree impaired

a normal takeoff of the TWA plane. First officer Reichardt went on to say, "To my recollection, we remained straight down the runway."

Captain Matheny, who testified regarding the effect of a compressor stall, said that after a compressor stall with its accompanying "pop", the engine will again run smoothly. He testified:

"Q. And the engine does continue to run?

A. Yes.

Q. So that if the pop represented a momentary compressor stall, in effect it did not at all affect the flight of TWA in its takeoff roll?

A. That's true, if I am correct in thinking, it was momentary.

Q. Well, have you ever experienced a compressor stall that was more than just momentary?

A. No.

Q. Have you ever lost an engine because of a compressor stall?

A. No.

Q. Now, even if you had lost an engine on this occasion due to compressor stall, would you have been able to continue the takeoff roll of TWA 159 and achieve a lift off?

A. I think that I could have, yes.

Q. All right, sir, and certainly if the compressor stall was momentary as you desribed it, the plane, had not the abort been initiated, could have continued to a normal takeoff, is that right, sir?

A. Yes, that's right."

Captain Matheny, who heard a noise in the TWA cockpit but experienced no abnormal action of the plane as it passed Delta, believed at the time that the TWA plane had experienced only a compressor stall. He testified that it was a mistake for the first officer to attempt the abort. In addition,

Matheny testified that the TWA procedure which allowed the first officer to initiate the abort may have been unsound in this situation. We quote the following from his testimony:

"Q. Now, based upon your experience as a TWA Captain with some 21,000 hours of flight experience, do you feel that it is good, sound, safe airmanship to permit the abort decision to be made by the First Officer when he is making the takeoff?

A. No, I do not.

• • •

Q. Now, if you had known prior to the initiation of this takeoff that there was a DC-9 in the vicinity of the runway, would you have permitted the First Officer to make the takeoff under those circumstances?

A. No."

There was evidence that after the accident here involved TWA adopted a policy that a decision to abort was to be made by the Captain. This put TWA in line with the policy of other major airlines.

Captain Matheny also testified that an aircraft is not obliged to go ahead with a takeoff merely because the control tower gives it a clearance to do so. Both Captain Matheny and his first officer, Reichardt, testified that had they looked they could have seen the Delta plane near to their runway, and that they had received the information that while the Delta aircraft was off the runway it was stuck in the dirt. The following from Captain Matheny is pertinent:

"Q. At any time during the takeoff roll, did there come a time when you did not have a clear runway before you?

A. No."

Under the above facts, Delta's position near the runway was not a hazard to TWA's successful completion of its take-

off. Also, even if the jet wash of Delta's engines across the runway caused a compressor stall on the TWA plane, this created no impediment to a successful takeoff. Without further extended and detailed discussion of the evidence, we express our view that *but for* the erroneous judgment of the TWA first officer, that he had struck the Delta plane, followed by his attempt to abort the flight without knowing, or having been advised, that he had exceeded the speed at which the abort could be successfully accomplished, the casualty here involved would not have occurred. The immediate, proximate cause of the casualty was made up of the first officer's erroneous belief that he had hit the Delta plane when his own view made it clear to him that he could not have done so, and the captain's failure to fulfill his obligation to keep the first officer advised of the attained speeds.

I. Proximate Cause.

If it can be said that Delta was negligent because it got stuck in the dirt *just off the runway,* its position was observable by TWA. There remained sufficient time for TWA to accomodate its procedure to Delta's position. Delta's negligence, if any, had ceased to be a factor in causing the casualty here involved. It was neither the sole proximate cause, nor one of the proximate causes, of the accident.

The only contribution that the Delta plane could have made to the TWA first officer's erroneous conclusion that he had hit the Delta plane must derive from the fact that as TWA was making its takeoff run, the Delta plane was sitting at substantially right angles to TWA's runway. In this position, its engines were at idle throttle, resulting in its jet wash passing across the runway. This fact, however, was known, or could have been known, by the TWA crew. Captain Matheny testified:

> "As we approached Delta • • • in the takeoff roll, I noted that, though he was indeed clear [clear of the run-

way], he remained very close to the runway and parked in a manner that directed jet blast at right angles to the direction of our takeoff."

If the position of the Delta plane was, or could have become, a hazard to the TWA plane, this fact was known to the TWA crew as it proceeded with its takeoff run. Captain Matheny further said:

"Q. Were you aware, then, as of November 6, 1967 that a jet aircraft making a takeoff on the runway passing through a jet exhaust of another aircraft might sustain a compressor stall as a result of that? Did you know that?

A. Well, I think, whether or not I received any of those bulletins – which I say I don't remember receiving – that I would have felt that was very hazardous, and that a compressor stall could occur under those circumstances."

Evidence that the TWA crew could have seen the mired Delta plane at the time they were given takeoff clearance was not denied. They had received the information that Delta had attempted a 180° turn, that it had failed to complete the turn, and that it was stuck in the dirt off the runway. In addition, the position of the Delta plane was observable from the airport control tower, a point further away from Delta than the point where TWA was waiting to begin its takeoff.[5] The TWA captain gave the following testimony on the subject:

"Q. Now, were you able to tell at the time you received your second clearance whether or not Delta 379 was moving or stationary?

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[5] Although the Delta plane was not completely illuminated by its own lights, it did have its anti-collision beacons and wing lights turned on. With these lights and the landing lights with which TWA was equipped, the TWA crew could see the Delta plane's location.

A. I don't know whether I could or not.

Q. Well, did you see the aircraft down there at that time?

A. I don't know.

Q. Well, was there anything that would have prevented you seeing the aircraft if you had looked for it?

A. I don't think so."

When the TWA crew consciously observed the location of the Delta plane, there was still time to abort their flight if the Delta plane was a hazard. No abort was then attempted. The TWA captain testified that notwithstanding the proximity of Delta to the runway, with its exhaust crossing the runway, the lift off – becoming airborne – would have, and could have, been accomplished but for the mistake of the copilot of TWA. We are persuaded that any negligence of Delta in maneuvering its plane off the runway ceased to be a causative factor in the conduct of TWA.

The Kentucky law of proximate cause is substantially the same as most of the other states. It is controlling here. *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). In *Morris* v. *Combs' Adm'r*, 304 Ky. 187 (1947), the Kentucky Court of Appeals defined proximate cause as:

> "that which, in a natural and continual sequence, unbroken by any new, independent cause produces the injury, and without which the injury would not have occurred." 204 Ky. at 191.

In determining whether an intervening act shifts proximate cause, the following test has been established:

> "It is elementary that if a cause is remote and only furnishes the condition or occasion of the injury it is not the proximate cause thereof. To be proximate, a cause is not required to be the last link in the chain of events. An act or force may intervene without breaking the chain

of cause and effect, so long as the intervening force or act is not the superseding cause. *A superseding cause relieves the original negligent actor from liability irrespective of whether the antecedent negligence was or was not a substantial factor in bringing about the injury* • • •. (Emphasis supplied.)

"• • • The question is primarily one of fact. If the original negligent act set in force a chain of events which the original negligent actor might have reasonably foreseen would, according to the experience of mankind, lead to the event which happened, the original actor is not relieved of liability by the intervening act. If, however, the ultimate injury is brought about by an intervening act or force so unusual as not to have been reasonably foreseeable, the intervening act is considered as the superseding cause and the original actor is not liable." *Hines* v. *Westerfield,* 254 S.W.2d 728, 729 (Ky. 1953).

In our review of this case, we are, of course, mindful of the general rule that the question of proximate cause is for the jury to determine. *See* W. Prosser, *Law of Torts* § 52, at 329 (3d ed. 1964). However, the Kentucky courts have recognized that,

"where the uncontradicted evidence is such that only one conclusion can be drawn therefrom by fair-minded men and that conclusion is that negligence of a party to an accident was the proximate cause, there is no issue of fact to be submitted to the jury and the court has the duty of determining the case as a matter of law." *Jewell* v. *Dell,* 284 S.W.2d 92, 95 (Ky. 1955).

The facts in the case of *Newton* v. *Wetherby's Adm'x,* 287 Ky. 400 (1941), make its decision helpful to resolution of the issue presented here. In *Newton* a motorist, Dr. Wetherby, invited a young man, Newton, to ride in the right front seat of the doctor's automobile. After making a stop, the doctor and

his passenger re-entered the car. The eleven year old passenger closed the right front door, but failed to do so securely. Plaintiff's theory of recovery was that while traveling at high speed, the door rattled. It could have been inferred that the doctor heard the rattling door, and that he should have corrected the situation. When eleven year old Newton attempted to secure the door, he was unaware that the door was hinged on the rear. Newton did open the door, at which time it flew open and the young man was thrown from the vehicle.

Assuming that negligence could be charged to the doctor's failure to see that the doors were secure and his failure to take notice of the rattling of the front door, the Kentucky court found that the proximate cause of the accident was the young man's opening of the door. The Court said:

> "But though it be assumed that Dr. Wetherby was negligent, it seems clear that such negligence was not the proximate cause of appellant's injuries. When an independent act intervenes between a defendant's negligence and the injury sustained, such act breaks the causal connection between the negligence and the damage. And where the negligence does nothing more than furnish a condition or give rise to the occasion by which an injury is made possible it cannot be made the basis of a recovery if there intervenes between it and the injury a distinct, successive, unrelated, efficient cause of the injury. *If no danger existed in the condition except by reason of the independent cause such condition was not the proximate cause.*" 287 Ky. at 403. (Emphasis supplied.)

In the instant case, the testimony was undisputed that had the first officer continued his takeoff roll after passing to the rear of Delta, the plane would have become airborne. Captain Matheny testified that the jet wash of the Delta, of which he was aware, would not have been an impediment to the takeoff. Neither did the position of the Delta plane pre-

vent a normal takeoff by TWA. There was no dispute but that it was clear of the runway. After seeing Delta, the TWA plane continued on its course down the middle of the runway; its takeoff procedure was in no way changed or affected by passing to the rear of the Delta plane.

The first officer's testimony as to what led him to the belief that he had hit the Delta plane is as follows:

"Q. And what occurred when you passed abeam of the aircraft?

A. I felt some roughness in the controls and received a loud report from the right-hand side of the aircraft.

Q. And then what, sir?

A. The report from the right-hand side of the aircraft and the roughness I felt in the controls led me to believe that I had hit this aircraft. I decided at that time to abort the aircraft."

The only testimony to explain the "loud report" is that of Captain Matheny who had judged the noise to be a compressor stall. He felt that the noise which emanated from the right side of the plane was somewhat louder than other compressor stalls he had heard, but he indicated that the volume of the "report" would be in proportion to the amount of "thrust" of the plane.

"Q. Meaning the higher the thrust the louder the noise?

A. Yes.

Q. But what I'm getting at is, is it a sharp, sudden report, or is it a dull, muffled type of sound?

A. The report we had on 159 [flight in question] was rather sharp, but I think all others that I have had have been rather subdued."

Captain Matheny was aware that the Delta plane's exhaust was crossing the runway. The first officer did not say whether he did or did not know about it. Although TWA

was in radio communication with the control tower and was capable of calling Delta, no inquiry was made as to whether Delta's exhaust was crossing TWA's takeoff path. In all events the crew of TWA observed the Delta plane and its position off the runway at a time when, if it was a hazard, the TWA plane could have been aborted safely. In addition, the evidence was clear that this compressor stall in no way affected the navigability of the TWA plane or impaired its opportunity for a safe and uneventful takeoff.

What, then, was the immediate or proximate cause of the TWA first officer's decision to abort the flight? It was a combination of his mistaken conclusion that he had hit the Delta plane and his unawareness that the speed of his plane already exceeded that at which the takeoff could safely be aborted. This latter lack of knowledge was in no way chargeable to Delta; it was caused solely by the TWA captain's failure to call out the critical takeoff speeds. We are of the view that if there was any negligence chargeable to the Delta crew in getting their plane stuck adjacent to the runway, such negligence had ceased to be a causative factor in the ultimate casualty. The errors and failure of duty by the TWA crew were the efficient and sole proximate cause of the accident. The Delta plane did no more than,

> "furnish a condition or give rise to the occasaion by which an injury is made possible it cannot be the basis of a recovery if there intervenes between it and the injury a distinct, successive, unrelated, efficient cause of the injury. If no danger existed in the condition except by reason of the independent cause such condition was not the proximate cause." *Newton* v. *Wetherby's Adm'x, supra,* 287 Ky. at 403.

We find additional support for this conclusion in our own decisions which have considered the Kentucky rule of proximate cause. In *Michael* v. *United States,* 338 F.2d 219 (6th Cir. 1964), a mail carrier, in violation of a Kentucky statute

had stopped his vehicle partly on the travelled portion of a road. The presence of this vehicle caused another to stop behind it, with both such vehicles blocking the northbound lane of the highway. Another north bound vehicle, travelling at a high and illegal rate of speed, attempted to go around the stopped vehicles, but his speed was such that he caromed off one of the vehicles into the southbound lane, where a head-on collision with plaintiff occurred. The District Judge found that the illegal driving of the speeding car was an intervening cause that eliminated the illegal parking of the mail carrier's car as a proximate cause of the accident. We affirmed the District Judge, saying:

> "Another rule of Kentucky law apposite to this case is that one guilty of negligence will not be charged in tort if some independent intervening cause interrupts the chain of causation so as to render such negligence so causally remote as not to be considered a proximate cause. One expression of the Kentucky rule is that 'if an independent cause intervenes, which is of itself sufficient to produce the result, it is regarded as proximate cause, and the originator of the first cause is relieved from liability.'" *Michael* v. *United States*, 338 F.2d at 220.

In *Black* v. *United States*, 441 F.2d 741 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971), a pilot of a small aircraft had made an inquiry of a Flight Service Station as to weather conditions in the area in which he was flying. His inquiry was answered, but the attendant at the station made no inquiry of the pilot's destination as required by a relevant regulation reading:

> "439.2 Whenever a SIGMET or Advisory to Light Aircraft exists which involves an area within 150 miles of the station, request the pilot's route and destination. Transmit the weather advisory if it is relevant."

Had this regulation been followed, the required inquiry would have disclosed that the plane was enroute to Fort Worth where

it would encounter adverse weather conditions. The plane crashed when it encountered a severe storm, killing all aboard. A judgment was awarded to the estate of the passengers on the plane against the United States for the negligence of its agent in failing to comply with the above quoted regulation. The United States conceded the negligence of its weather station agent, but argued that such negligence was not a proximate cause of the fatality because it had been superseded by the negligence of the plane's pilot which was the immediate and efficient cause of the tragedy. The trial judge held that the negligence of the government agent and the plane's pilot concurred to provide the proximate cause.

In reversing the District Court, the Fifth Circuit said:

> "When the pilot saw the storm he had to make a decision either to proceed, to alter or reverse his course, or to land. His decision was to proceed. From then on can it be said that the failure of the operator almost two hours earlier to warn him of Sigmet Charlie 2 [the storm] proximately contributed to that decision? We think not." 441 F.2d at 745.
>
> "Appellant's negligence had 'so far spent itself as to be too small for [the] law's notice,' and was so completely superseded by that of the pilot that it was no longer a material element contributing to the tragic results that ensued. In our judgment the findings of the lower court on the issue of proximate cause are clearly erroneous." 441 F.2d at 746.

We believe the Fifth Circuit's decision provides analogy for our decision.[6]

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[6] Our conclusion that conduct of Delta was not a proximate cause of the casualty, and that TWA was, as a matter of law, guilty of contributory negligence, obviates a determination whether or not Delta was guilty of negligence. We think, however, that we should expose the basis of Appellee's charge that Delta was negligent. The TWA brief charges that the Delta crew was negligent in overshooting runway 18-36 and choosing — with the tower's permission —

II. Contributory Negligence.

We hold that the action of TWA against Delta was barred by contributory negligence on the part of the crew of the TWA plane. Contributory negligence is a defense in bar under Kentucky law. *Williams* v. *Chilton*, 427 S.W.2d 586, 591 (Ky. 1968); *Banner Transfer Co.* v. *Morse*, 274 S.W.2d 380, 382 (Ky. 1954).

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to turn around to permit exiting on 18-36; that they should have gone on to another runway further to the west.

The failure of the Delta crew to successfully exit on runway 18-36 was known to the tower and the TWA crew before the latter started to take off. Delta, advised of the imminence of a take off by the TWA plane, was seeking to get out of the way and there was no evidence that the mud that frustrated the success of their exit was observable before they actually got into it.

TWA argues that when the tower asked the Delta crew whether they were "clear of the runway" Delta should have done something more than make the truthful answer they did give; that they should have expressed a view that their position was a hazard to any plane taking off. They did, however, immediately mention that they were stuck in the mud. This information was given to TWA and neither the tower nor TWA made inquiry for more detailed information as to the actual dimension of Delta's being "clear of the runway." In his opinion exonerating the United States of fault, the District Judge observed:

> "The government in this lawsuit has claimed that the *sole proximate cause of this accident* was 'patently' TWA's failure to abort when its crew first saw where Delta was."

The tower was apparently satisfied with the information which it had obtained from Delta, and upon which it acted in telling TWA to proceed. The TWA crew did not indicate any inadequacy in Delta's answer to the tower and it knew that Delta was stuck in the mud.

Conversely to the government's casting of fault on TWA, is the latter's counter attack in its cross-complaint against the United States wherein it charges that damages suffered by its passengers — the Rosenthals — were *"a direct and proximate result of the negligence • • • of the said agent [the tower man] an employee of the Federal Aviation Administration."* (Emphasis supplied.)

Upon trial, the tower man and one of the TWA crew, without any relevant qualification therefor, testified that "clear of the runway" meant that the Delta plane was a sufficient distance so as not "to

Ordinarily such question is for resolution by the jury. *Banner Transfer Co.* v. *Morse,* 274 S.W.2d 380, 382 (Ky. 1954); *Padgett* v. *Brangan,* 228 Ky. 440 (1929); *Hardware Mutual Casualty Co.* v. *Union Transfer & Storage Co.,* 205 Ky. 651 (1924). However, "where fair-minded men may properly draw but one conclusion from the testimony adduced, the question of whether or not a person is guilty of contributory negligence becomes a matter for the court to decide." *Louisville & Nashville Railroad* v. *Hines,* 302 S.W. 2d 553, 556 (Ky. 1956). *See Banner Transfer Co.* v. *Morse, supra,* 274 S.W. 2d at 382.

If contributory negligence is to constitute a bar to recovery, it must be shown to have been proximate, and not remote in causation. *Travis* v. *Hay,* 352 S.W.2d 209, 211 (Ky. 1961). This rule was expanded upon by the court in *Louisville & Nashville Railroad* v. *Hines, supra,* 302 S.W.2d at 556, where the court stated:

> "It is not necessary that the contributory negligence be the sole cause of the accident from which the injury flows; it is sufficient if it contributed to the accident to such an extent that but for the concerted action the same would not have occurred. Contributory negligence on the part of the injured person necessarily assumes negligence on the part of the person against whom recovery is sought, but if the contributory negligence on the part of the injured person was such that without it the injury would not have been received, such person is not entitled to recover."

We believe our recital of the evidence in our consideration of proximate cause adequately portrays the negligence of the TWA crew. By way of summary, we add the following observations:

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constitute a hazard to the runway." These statements were gratuitous and no one said what distance would be required before a "yes" could be given to the tower's inquiry of Delta as to whether it was clear of the runway.

Notwithstanding all that was known and had occurred before the illfated attempt of the first officer to carry out an abort, Captain Matheny was satisfied that the plane would have, and could have, become airborne if the first officer had merely continued his takeoff. The first officer said nothing about his plan to attempt an abort, and the captain was taken by surprise when the abort was initiated. His surprise is evidenced by his exclamation:

"I thought I said, 'My God, what are you doing?' "

He was then asked:

"Q. Well then, do you recall that the First Officer said 'sorry.'?

A. I remember that.

Q. Anything else or just the word 'sorry.'

A. I just remember the apology, I don't know just what he said."

Captain Matheny took no part in the first officer's decision to attempt the abort, and a fair reading of his testimony exposes his belief that the real cause of the casualty was his less experienced first officer's obvious panic in attempting the abort, unaware of the then attained speed of the plane. The captain, who had failed in his duty to call out the critical speed, was surprised to learn that the plane had attained a speed of 145 knots – greatly in excess of the critical V_1 speed of 132 knots. The following portrays the scene within the TWA cockpit:

"Q. As a matter of fact, you were caught by surprise by this abort, weren't you?

A. Yes.

Q. And it was because you were caught by surprise that there was some delay in your getting with the abort procedure, isn't that true?

A. That's probably true. Yes."

The TWA captain and the first officer both testified that they did not know their plane's speed when they passed Delta. The first officer said, "I have absolutely no idea as to whether [when abeam of Delta] I had achieved V_1 or not."

We are satisfied that upon fair consideration of the evidence the only conclusion that can be reached is that negligence of the TWA crew contributed to the casualty. This we hold as a matter of law, and appellee's action must accordingly fail. *Louisville & Nashville Railroad* v. *Hines*, 302 S.W.2d 553 (Ky. 1956); *Banner Transfer Co.* v. *Morse*, 274 S.W.2d 380, 382 (Ky. 1954).

III. Motion for New Trial.

Our above ruling makes it unnecessary to consider refusal to allow an expert witness called by Delta to answer several questions; this is true also of the claimed impropriety of argument to the jury by TWA counsel.

However, understanding of the jury's verdict in the face of the above detailed evidence will be aided by some discussion of the background which gave rise to the alleged improper jury argument. A tape recorder was in operation in the Delta cockpit during, and just prior to, the happening of the relevant and exciting events. This could have recorded conversation in the Delta cockpit during and immediately after efforts to get the Delta plane off the runway. However, a button on the Delta recorder was pressed, activating an erasing mechanism which eliminated such conversation. The reasons given by the Delta crew for such erasure could lead to a sophisticated conclusion that they were trying to cover up some misconduct. The Delta crew said that its captain, in the annoyance that followed his getting stuck in the mud, had used profanity, including some four letter words, which he did not wish perpetuated. Delta also claimed that it was customary to make such erasure at the conclusion of a flight.

We would not fault a jury for questioning the truth of the asserted excuses for erasing the tape nor blame an able

advocate for exploiting the apparent hiding of evidence by his opponent's witnesses.

The Delta cockpit voice recorder tape was played to the jury; this covered that part of the tape which had been erased as well as that which followed the erasure. TWA Exhibit 6 was a transcript of that portion of the cockpit voice recorder which followed such of it as was erased. The transcript is as follows:

TRANSCRIPT OF FIRST PORTION OF THE COCKPIT VOICE RECORDER TAPE FROM DELTA AIRLINES FLIGHT 379, DC-9, N33176, GREATER CINCINNATI AIRPORT, NOVEMBER 6, 1967, OF INTEREST TO THE ACCIDENT INVESTIGATION OF TWA FLIGHT 159.

LEGEND

CAM —Cockpit Area Microphone Circuit
• —Non-pertinent transmissions
% —Unintelligible word or phrase
# —Non-pertinent word or phrase

Time	Source	Content
2343:51	CAM	All those people are killed
		#
		#
2344:03	CAM	I, I just wondered if, if us sitting here— I don't know
	CAM	Shh!
	CAM	I sure hope—
44:20	CAM	(%%) Voice Recorder
	CAM	Sure it's runnin'?
	CAM	%%
44:30	CAM	We have nothin' really to speak of
	CAM	Fire is burning
2345:02	CAM	Damn nose wheel slid out
	CAM	Yeah, it's cocked all the way over
45:10	CAM	Well, that's why we started to (rest of conversation overriden by communications emanating from cockpit speaker)

	CAM	Yeah, if I can (overriden)
45:15	CAM	If I could have gotten straightened (Overriden) we would have

Time	Source	Content
45:57	CAM	I guess we're off the runway. I don't know
2346:03	CAM	When he went by us he was, he was, he was in reverse already and I (pause) I couldn't actually–I said ## what the hell's the noise you know, and I felt the air rush–
	CAM	Yeah
	CAM	–the airplane
46:23	CAM	Oh boy!
		• • • • • •
2349:07	CAM	I wonder if the exhaust of our engines had any effect on him
	CAM	No, he was in reverse already when he went by
	CAM	Yeah
2349:24	CAM	(%) I've taken off many time at O'Hare with guys just turning off–
	CAM	Yeah
	CAM	–and you just go by. There's nothin' really to it. Ya got speed
	CAM	Yeah
2349:33	CAM	He was in reverse thrust when, when I saw him. The tower says are you clear of the runway and I says roger we are
	CAM	Yeah
2349:41	CAM	And I could s— then I saw this guy comin' at us. Boy he was just a-roarin' you know when he went by us. Of course it blasted the tail and, uh, all that noise, I'll tell ya, it was close

Such speculations by the Delta crew, as set out in the preceding transcript and the earlier evidence, would indeed provide able counsel with a fertile field for jury argument. While

it portrays the Delta crew's excitement and wonder whether they might have been at fault, none of the miscellany set out above impairs the correctness of our analysis of the facts.

The panel sitting on this case has had the entire Delta cockpit voice recorder tape played to them. This included the portion of the tape which was erased. While such portions produced audible sounds at maximum volume, such sounds were without significance critical to the decision of this case.

The specific part of TWA's closing argument which Delta claims was prejudicial is the following:

> "Now, let's just consider a minute about what they [the Delta pilots] said they were doing there. The sitting down doing nothing in idle is improbable. You will hear the Judge instruct you on the evidence and the credibility of witnesses. I am not going to tell you how to do it. Of course, you are considering all the time probabilities, so you could consider how a witness handles himself on the stand and how he parries questions.
>
> *"It is our position here, and I submit to you, that in fact what was happening during that 30-second period was that they were trying to blast that plane further off the runway."*

Counsel then went on to "ring the changes" on the inference which he argued could be drawn from the erasure of the tape. Experienced advocates will be aware of the devastating use that can be made of what appears to be an effort to destory evidence. We discuss it as our speculation as to how a jury was persuaded to cast the blame for this casualty upon the Delta crew.

IV. New Trial as to Delta's Cross-Claim Against TWA.

This lawsuit had its beginning as a personal injury action by the Rosenthals against Delta and TWA.[7] The procedures

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[7] Most of the passengers and crew of the TWA plane got out before it burned up. Only the Rosenthals brought suit.

which followed and the question presented is set out in Delta's address to us.

> "Delta asserted a cross-claim against TWA seeking either complete indemnity or contribution, pursuant to the law of Kentucky, for any amounts which Delta might be required to pay to the plaintiffs.
>
> "During trial counsel for Delta submitted a requested instruction to the jury on the law governing the jury's consideration of that cross-claim. The District Court decided that the cross-claim of Delta against TWA would not be submitted to the jury initially but, if the jury should return verdicts in favor of the plaintiff and against both TWA and Delta, the court would then immediately instruct the jury with respect to Delta's cross-claim against TWA and send the jury back to deliberate and return a verdict on the cross-claim.
>
> "In view of the fact that the jury returned its verdicts in favor of each plaintiff and against Delta alone, there was no occasion to submit to the jury Delta's cross-claim against TWA and the District Court entered judgment on that cross-claim in favor of TWA. If the verdicts and judgment in this case are permitted to stand, they would be adjudicative of the issues raised on Delta's cross-claim against TWA and there would be no basis for a new trial on the cross-claim.
>
> "In the strictest sense, there was not any trial at all on Delta's cross-claim against TWA because that claim was never submitted to the jury. We have, however, asked for a new trial on that cross-claim because, in the event that final judgment should be entered in favor of Delta or a new trial should be granted, Delta should be entitled to take its case to a jury on its cross-claim against TWA.
>
> "If, after a new trial, the jury should find that TWA alone was negligent, Delta would be entitled to be indemnified by TWA for such amounts as it has paid to the Rosenthals in satisfaction of their judgments. Should the jury find that both Delta and TWA were negligent and that their negligence directly and proximately contri-

buted to the injury to Mr. Rosenthal and the death of Mrs. Rosenthal, then under the law of Kentucky each should be required to pay half of the amounts paid to the Rosenthals."

TWA's brief does not discuss the question thus stated. On the basis of our holdings on proximate cause and contributory negligence, Delta is entitled to a trial on its cross-claim against TWA. We cannot, however, make final disposition of the matter by an order now to be entered. Delta's cross-claim was never submitted to a jury; neither was a motion for a directed verdict upon such cross-claim presented to the District Judge. We accordingly remand this phase of the matter for disposition by the District Court.

We remand the cause to the District Court for entry of judgment for Delta in the action brought against it by TWA-Federal and for further consideration by the District Court of the procedure to be followed regarding Delta's cross-claim against TWA for contribution and indemnity.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-2211

DELTA AIR LINES, INC.,

Defendant and Third-Party Plaintiff-Appellant,

vs.

TRANS WORLD AIRLINES, INC., and
UNITED STATES OF AMERICA,

Defendants-Appellees.

Before: WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Judge.

JUDGMENT

(Filed January 17, 1974)

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the case is remanded for entry of judgment for Delta in the action brought against it by TWA-Federal and for further consideration by the District Court of the procedure to be followed regarding Delta's cross-claim against TWA for contribution and indemnity.

It is further ordered that Defendant-Appellant recover from Defendant-Appellee, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

Issued as Mandate:
COSTS: To be recovered by Appellant

A True Copy.
Attest.

Filing fee	$ 25.00
Printing	$7,868.46
Total	$7,893.46

James A. Higgins, Clerk